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No. 85-

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

HAROLD E. ANDERSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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Date: March 17, 1986

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A STATE, HERE MISSOURI, IMPERMISSIBLY DEPRIVES INTERSTATE RAIL CARRIERS OF THE EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY MANDATING THE SUBMISSION OF ADMITTEDLY UNFAIR GENERAL NEGLIGENCE INSTRUCTIONS TO JURIES IN F.E.L.A. CASES BUT REQUIRING THE SUBMISSION OF SPECIFIC NEGLIGENCE INSTRUCTIONS IN ALL OTHER NEGLIGENCE CASES, CONTRARY TO THE CLEAR DECISIONS OF THIS COURT?

II. WHETHER SUCH A REQUIREMENT PLACES AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF ARTICLE I, SECTION 8 OF THE UNITED STATES CONSTITUTION WHEN NO LOCAL INTEREST IS INVOLVED?

PARTIES TO THE PROCEEDINGS BELOW AND SUPREME COURT RULE 28.1 STATEMENT

In compliance with Rule 28, Petitioner states that Petitioner's parent company is Burlington Northern Inc. The partially owned subsidiaries and affiliates of Petitioner and Petitioner's parent are:

Burlington Northern Railway Company:

- The Belt Railway Company of Chicago
- Camas Prairie Railroad Company
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- The Lake Superior Terminal and Transfer Railway Company
- Longview Switching Company
- The Minnesota Transfer Railway Company
- Paducah & Illinois Railroad Company
- Portland Terminal Railroad Company
- The Saint Paul Union Depot Company
- Terminal Railroad Association of St. Louis
- Trailer Train Company
- The Wichita Union Terminal Railway Company
- Winona Bridge Railway Company

Burlington Northern Inc.:

- New Mexico & Arizona Land Co.

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No. 85-

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BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

HAROLD E. ANDERSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

Petitioner, Burlington Northern Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Eastern District, entered on September 24, 1985.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Eastern District, is reported at 700 S.W.2d 469 and is reproduced in the appendix ("App." A1-A18). Petitioner's application for transfer to the Missouri Supreme Court was denied December 17, 1985, which order of denial is reproduced in the appendix at A27.

JURISDICTIONAL STATEMENT

Burlington Northern Railroad Company (hereafter referred to as Petitioner), files this Petition for Writ of Certiorari following an adverse jury verdict in the Circuit Court of the City of St. Louis, Missouri in an action brought under the Federal Employers' Liability Act, 45 U.S.C. §§51 et seq. (F.E.L.A.). Petitioner appealed to the Missouri Court of Appeals, Eastern District, which affirmed the verdict in *Anderson v. Burlington Northern R.R. Co.*, 700 S.W.2d 469 (Mo.App. 1985). Petitioner properly filed with the Court of Appeals a Motion for Rehearing or Rehearing En Banc or For Transfer to the Supreme Court of Missouri (App. A19). After the Court of Appeals denied those motions (App. A23), Petitioner filed an application for transfer with the Supreme Court of Missouri (App. A24) pursuant to Missouri Supreme Court Rule 83 (App. A45).

On December 17, 1985 the Missouri Supreme Court denied Petitioner's application for transfer (App. A27). This petition is timely, having been filed within 90 days thereafter. 28 U.S.C. §2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). The questions presented involve the invalidity and unconstitutionality of a certain mandatory jury instruction promulgated by the Missouri Supreme Court (Missouri Approved Instruction 24.01)[1] for F.E.L.A. cases, which denies equal protection to railroads subject to the F.E.L.A., resulting in an invidious discrimination against such railroads by the State of Missouri in violation of the Fourteenth Amendment and contrary to decisions of this Court and the highest courts of several other states, and imposes an

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1. M.A.I. is an abbreviation for Missouri Approved Instructions, the Missouri mandatory pattern jury instructions.

undue burden on interstate commerce in violation of Article I, Section 8 of the Constitution.

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Article I, Section 8

Section 8. The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The issues raised herein concern Missouri jury instruction practice as required by the Missouri Supreme Court which discriminates against F.E.L.A. defendants, places railroads at an unfair disadvantage in defending F.E.L.A. cases, and is contrary to the decisions of this Court.

Although the Missouri Court of Appeals opinion (App. A1-A18) sets out in some detail at least part of the evidence concerning Respondent Anderson's injury, Petitioner will briefly summarize the facts. This case was first tried in June, 1981, resulting in a verdict and judgment against Petitioner in excess of One Million Dollars. That judgment was reversed by the Missouri Court of Appeals and the case was remanded for retrial. *Anderson v. Burlington Northern R.R. Co.*, 651 S.W.2d 176 (Mo.App. 1983). The case was retried in October, 1983 on Respondent's amended petition alleging five specific claims of negligence.

The evidence on retrial showed that the Respondent, Mr. Anderson, was 19 years old when he sustained an eye injury on May 6, 1977. At that time he was a carman helper at Petitioner's shops in Springfield, Missouri, working on the assembly of new coal hopper cars. His duties required him to use an air-powered reamer to ream bolt holes to the correct size in the cars being assembled. It was Respondent's testimony that he was furnished only safety glasses or spectacles and not goggles for doing this work, and that the exhaust from the reamer caused metal shavings to be blown into his face at times, and at other times when he was under cars putting bolts into holes shavings would drop onto his face and get in the vicinity of his eyes. There was conflicting testimony concerning whether goggles were made available to him. Respondent offered evidence of different and other types of eye protection which he claimed should have been provided him, of the lack of any strict enforcement of a general eye safety program, and of the fact that steel shavings from the reaming accumulated on the floor and on the cars being assembled. He testified that on May 6, 1977 while using a reamer, he felt a pain in his eye. When he finally saw a doctor several days later a steel particle was re-

moved from his eye, but he returned to work. An infection thereafter developed allegedly due to unsanitary shop conditions, and the eye was ultimately removed. In all, Respondent's counsel alleged some 17 different grounds of negligence in his opening statement to the jury and 11 different allegations of negligence in his final jury argument.

At the instruction conference in the trial court prior to jury submission counsel for Petitioner objected to the giving of Respondent's tendered Instruction No. 6 based on M.A.I. 24.01 on the grounds that such instruction denied to Petitioner the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, and imposed an undue burden on interstate commerce contrary to the Commerce Clause, Article I, Section 8 of the United States Constitution, since the use of such general negligence instruction was mandated by the Missouri Supreme Court for use only in F.E.L.A. cases. In its motion for new trial and at each step in the appellate process Petitioner preserved its constitutional objections.

Although Petitioner's evidence was in conflict with that of Respondent on virtually every point, the trial court submitted the case to the jury on two general, nonspecific charges of negligence in the form required by the Missouri Supreme Court in Missouri Approved Instruction (M.A.I.) 24.01. No instruction by the court limited the jury's consideration to even the 17 claims made by Respondent's counsel in his opening statement, much less the five allegations of the Amended Petition. Instead the jury was directed to find for Respondent if Petitioner either failed to provide (1) reasonably safe conditions for work, or (2) reasonably safe appliances, and in one or more of those respects was negligent. Under

Missouri Supreme Court Rule 70 (App. A43-A44) it is clear that Missouri Approved Instructions are mandatory and must be used to the exclusion of any others. M.A.I. 24.01 is mandated for use only in F.E.L.A. cases (App. A33-A34).

In all negligence cases except those brought pursuant to the F.E.L.A. the Missouri Supreme Court requires the submission to the jury of specific charges of negligence. The jury instructions mandated by M.A.I. require the jury to find the defendant guilty of particular acts or omissions constituting negligence as a condition to a plaintiff's verdict. The sole exception to this practice is in F.E.L.A. cases, in which the Missouri Supreme Court mandates the submission to the jury of only a general negligence charge. Petitioner objected to the required instruction on the grounds that it gave the jury a roving commission and constituted a submission of general negligence, thereby discriminating against railroad defendants operating in interstate commerce and subject to the F.E.L.A. Petitioner also objected to the instruction on the grounds that it imposed an improper burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Article I, Section 8, and failed to afford interstate railroads the equal protection of the law with other employers sued for personal injury, in violation of the Fourteenth Amendment (App. A30). Petitioner's objections were overruled by the trial court. Under the general negligence submission given, the jury found for Respondent and awarded him $800,000 in damages.

Petitioner filed a timely motion for new trial in which it renewed its constitutional objections (App. A36-A39), but the trial court denied that motion (App. A41). Petitioner appealed to the Missouri Court of Appeals, Eastern District, preserving its constitutional challenges (App.

A42). That court affirmed the judgment in *Anderson v. Burlington Northern R.R. Co.*, 700 S.W.2d 469 (Mo.App. 1985). Petitioner filed its motion for rehearing, or for rehearing en banc, or for transfer to the Missouri Supreme Court (App. A19-A22) which alternative motion was denied (App. A23). Petitioner next filed an application for transfer with the Missouri Supreme Court, seeking review of the Court of Appeals opinion, preserving the constitutional issues raised herein (App. A24-A26). On December 17, 1985 the Missouri Supreme Court denied the application for transfer (App. A27). On December 18, 1985 the Missouri Court of Appeals issued its mandate affirming the judgment (App. A28).

The use of the general negligence instruction in F.E.L.A. cases constitutes a denial of equal protection because the Missouri Supreme Court, without any rational basis for distinction, requires such submission in F.E.L.A. cases yet disapproves the use of general negligence instructions in all other personal injury and master-servant negligence cases. This is contrary to the decisions of this Court that juries are to be instructed in F.E.L.A. cases tried in state courts in the same manner as all other negligence cases in those courts. The trial court and the Missouri Court of Appeals, Eastern District, both held against Petitioner on its constitutional objections on the basis that the use of M.A.I. 24.01 was mandatory, and the Missouri Supreme Court refused to review that determination and the propriety of the instruction when it denied Petitioner's application for transfer.

REASONS FOR GRANTING THE WRIT

I. The Mandatory Instruction System of the Missouri Supreme Court Requires the Use of a "General Negligence" Jury Instruction in F.E.L.A. Cases, Contrary to the Missouri Requirement That All Other Negligence Cases Be Submitted to the Jury on Specific Factual Claims, Thus Denying Railroad Defendants Equal Protection of the Law in Violation of the Fourteenth Amendment to the United States Constitution, and Contrary to the Decisions of This Court That F.E.L.A. Cases Filed in State Courts Are to Be Treated Procedurally in the Same Way As Other Negligence Suits, and Contrary to the Decisions of the Highest Courts of Other States.

This case presents a question of national importance, applicable to F.E.L.A. cases brought in the state courts of all 50 states, and directly affects the constitutional rights of interstate rail carriers sued in state courts under the Federal Employers' Liability Act, 45 U.S.C. §§51 et seq., particularly those sued in Missouri.

This Court's Decisions Require F.E.L.A. Cases in State Courts to Be Tried Under the Same Local Instruction Procedure As All Other Cases.

Where F.E.L.A. cases are tried in state courts, the state is to apply the same procedural rules that it does in all other negligence cases. In the Second Employers' Liability Act Cases (*Mondou v. New York, New Haven & Hartford R.R. Co.*) 223 U.S. 1, 32 S.Ct. 169, 178, 56 L.Ed. 327 (1912) this Court specifically held that the Employers' Liability Act did not involve "any attempt by Congress to enlarge or regulate the jurisdiction of state

courts, or to control or affect their modes of procedure . . . ." In *Chesapeake & Ohio Ry. Co. v. DeAtley,* 241 U.S. 310, 36 S.Ct. 564, 566, 60 L.Ed. 1016 (1916), this Court specifically decided that the manner of instructing juries was procedural and that in F.E.L.A. cases filed in state courts, the usual state court procedure with respect to jury instructions was to be followed, saying:

> Although the present action was based upon a Federal statute, it was triable and tried in a state court; hence local rules of practice and procedure were applicable.

Most recently, in *St. Louis Southwestern Ry. Co. v. Dickerson,* ..... U.S. ....., 105 S.Ct. 1347, 1348, ... L.Ed.2d ..... (1985), a case dealing with jury instructions, this Court said:

> [1, 2] As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal.

In *Minneapolis & St. Louis R.R. Co. v. Bombolis,* 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916) this Court held that where a state permitted a non-unanimous verdict to be returned by a jury in negligence cases, that rule was likewise applicable to F.E.L.A. cases, against a contention that a unanimous verdict should be required since the F.E.L.A. was a federal act. In *Dice v. Akron, Canton & Youngstown R. Co.,* 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952) the Court indicated that, in accordance with *Bombolis, supra,* if a state abolished trial by jury in all negligence cases then juries would not be required under the Federal Employers' Liability Act. In the separate concurring and dissenting opinion of Mr. Justice Frankfurter, concurred in by three other justices, is the following language which seems particularly applicable here:

> It has been settled ever since the Second Employers' Liability Cases (Mondou v. New York, N.H. & H. R. Co.) 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, that no State which gives its courts jurisdiction over common law actions for negligence may deny access to its courts for a negligence action founded on the Federal Employers' Liability Act. Nor may a State discriminate disadvantageously against actions for negligence under the Federal Act as compared with local causes of action in negligence.
>
> * * *
>
> So long as all negligence suits in a State are treated in the same way, by the same mode of disposing equitable, non-jury, and common law, jury issues, the State does not discriminate against Employers' Liability suits nor does it make any inroad upon substance.
>
> * * *
>
> The State judges and local lawyers who must administer the Federal Employers' Liabality Act in State courts are trained in the ways of local practice; it multiplies the difficulties and confuses the administration of justice to require, on purely theoretical grounds, a hybrid of State and Federal practice in the State courts as to a single class of cases. Nothing in the Employers' Liability Act or in the judicial enforcement of the Act for over forty years forces such judicial hybridization upon the States.

342 U.S. at 364-368, 72 S.Ct. at 316-317.

The Highest Courts of Other States Require the Same Instruction Procedure to Be Used in F.E.L.A. Cases As in Other Cases.

The highest courts of at least three states have held that the jury must be instructed in the same manner in

F.E.L.A. cases as in all other personal injury negligence cases tried in the courts of those states, contrary to the practice in Missouri. In dealing with an instruction issue, the Supreme Court of Texas held in *Thompson v. Robbins,* 157 Tex. 463, 304 S.W.2d 111, 116-117 (1957):

> We agree with the defendant that the Texas Rules of Civil Procedure control. The plaintiff invoked the jurisdiction of the state courts and the case should be tried as any other suit for damages is tried in the state courts so far as procedural matters are concerned. Therefore, in view of our policy that all special issues should be framed in such form as to not inform the jury of the effect of its answers, we believe that issue No. 38 should have been framed so as to inquire of the jury as to what percent the negligence of the plaintiff bore to the entire negligence, if any, of both the plaintiff and the defendant.

In *Chesapeake & Ohio Ry. Co. v. Meadows,* 119 Va. 33, 89 S.E. 244 (1916) the Supreme Court of Appeals of Virginia dealt with a contention that the contributory negligence - damage mitigation aspect of the F.E.L.A. required the jury to return a special verdict. That court held to the contrary, saying:

> [3] We do not see that the trial of a case under the federal Employers' Liability Act differs at all as to procedure from any other negligence case. * * * When Congress gave the state courts co-ordinate jurisdiction in this class of cases with the federal courts, by necessary implication it adopted the procedure and practice of the state courts for the trial of such cases. *C. & O. Ry. Co. v. Carnahan,* 118 Va. 46, 86 S.E. 863.
>
> * * *

> If a special verdict were proper in this case, it would be proper and necessary to have a special verdict in every negligence case, . . .; yet such a verdict is, as we have seen, unknown to our practice, and there is nothing in the language of the federal statute that expressly requires such a proceeding, or from which such a proceeding is necessarily implied.

89 S.E. 247.

The highest court of North Carolina has held likewise in *Miller v. Norfolk Southern Ry. Co.*, 240 N.C. 617, 83 S.E.2d 533, 534 (1954):

> [1] In this case the rules of liability and recovery are governed by the provisions of an Act of Congress known as the Federal Employer's Liability Act, 45 U.S.C.A. §51 et seq. When a case is brought under this Act in the State courts, matters of procedure, such as the judge's charge, are governed by rules of the North Carolina courts.

Jury instruction practice is also governed by local rules in F.E.L.A. cases tried in state courts in Washington and Illinois as demonstrated by the decisions of the highest courts of those states, although without specific comment on the issue. *Dick v. Great Northern Ry. Co.*, 12 Wash.2d 364, 121 P.2d 966 (1942); *Pinkstaff v. Pennsylvania R.R. Co.*, 20 Ill.2d 193, 170 N.E.2d 139 (1960), *cert. denied*, 365 U.S. 878 (1961).

The Missouri Courts Condemn General Negligence Instructions As Unfair and Discriminatory and Forbid Their Use in All Other Cases.

The Missouri courts repeatedly have condemned the submission of negligence issues to juries by so-called "general negligence" instructions and on the contrary have

required the submission of specific factual issues to the jury for their determination, saying that general negligence instructions are "unfair" to defendants, *Miller v. United Railways Co. of St. Louis,* 155 Mo.App. 528, 134 S.W. 1045 (1911), "prejudicial to defendant", *Killian v. Albert Wenzlick Real Est. Co.,* 89 S.W.2d 716 (Mo.App. 1936), "wholly deficient", *Feldewerth v. Wabash R.R. Co.,* 181 Mo.App. 630, 164 S.W. 711 (1914) and constitute "taking an undue advantage of defendant." *Beave v. St. Louis Transit Co.,* 212 Mo. 331, 111 S.W. 52 (1908).

Such instructions have been said by the Missouri courts to fail to give the jury any guidance or direction as to the grounds on which, under the evidence, a defendant may be found to have been negligent and to leave the jury free to speculate and conjecture, on their own, concerning defendant's negligence. *Luckey v. Avon Products, Inc.,* 589 S.W.2d 364 (Mo.App. 1979); *Douglas v. Hoeh,* 595 S.W.2d 434 (Mo.App. 1980). Such instructions are condemned as permitting the jury to "invoke their imaginations or draw upon mere conjecture" as to whether a defendant might in some manner not shown by the evidence have avoided injury to plaintiff. *Miller v. United Railways Co., supra,* 134 S.W. at 1050. Since adoption by the Missouri Supreme Court of the Missouri Approved Instructions, a jury instruction in any other than an F.E.L.A. case must hypothesize some specific fact constituting negligence and not require the jury to resort to substantial conjecture. *Dick v. Scott Construction Co.,* 539 S.W.2d 688 (Mo.App. 1976). See also *Moore v. Quality Dairy Co.,* 425 S.W.2d 261 (Mo.App. 1968) and *McIntyre v. Whited,* 440 S.W.2d 449 (Mo. 1969).

Prior to the adoption of M.A.I., the jury submission in F.E.L.A. cases was required to be based on specific negligence, similar to all other cases and consonant with the

principle that the local procedure was to be followed by state courts in the trial of F.E.L.A. cases. See, for example, *Winters v. Terminal R.R. Ass'n of St. Louis,* 363 Mo. 606, 252 S.W.2d 380 (1952), *Johnson v. Missouri-Kansas-Texas R.R. Co.,* 334 S.W.2d 41 (Mo. 1960) and *Beard v. Railway Express Agency, Inc.,* 323 S.W.2d 732 (Mo. 1959).

In 1965, however, the Missouri Supreme Court adopted Missouri Approved Instructions, as promulgated by a committee appointed by the court for the purpose of drafting such instructions. Those "pattern" instructions still require the submission of specific negligence to the jury in all cases except F.E.L.A. cases, but as demonstrated by M.A.I. 24.01, mandate the submission of an F.E.L.A. case on a charge of general negligence.

Missouri Intentionally Discriminates Against F.E.L.A. Defendants.

The Missouri Supreme Court deliberately intended to treat railroads unequally in this fashion as demonstrated by its opinion in *Ricketts v. Kansas City Stockyards Co. of Maine,* 484 S.W.2d 216 (Mo. Banc 1972). Plaintiff there was suing his nonrailroad employer at common law for an injury sustained at work, allegedly due to the employer's negligence. Plaintiff had submitted and the trial court gave a general negligence instruction precisely in the language of M.A.I. 24.01. The Missouri Supreme Court held that M.A.I. 24.01 was to be used solely in F.E.L.A. cases, and that its use constituted prejudicial error in any other case, saying at 484 S.W.2d 221-222:

> This instruction's wording in what it submitted follows M.A.I. 24.01 which is designed for submission of F.E.L.A. cases; and for the reasons hereinafter stated should not be used in other cases.
>
> * * *

> We also consider this instruction too broad and indefinite in submitting only failure to provide reasonably safe conditions of work but not submitting any condition as not being reasonably safe. Our view is that M.A.I. requires such a submission in all usual negligence cases as illustrated by its model instructions . . .
>
> * * *
>
> Plaintiff's verdict directing instruction could have submitted, in accordance with [his specific negligence] theory, a finding that the place or conditions of work were unsafe because or on account of having the men work on a scaffold where they would be standing below the gutter they were required to remove. Defendant's evidence was that the method used was as safe or safer than that suggested by plaintiff's expert and that was the issue for the jury to decide. The verdict directing instruction should have required a finding on that issue. For the reason specified we must hold Instruction No. 3 to be prejudicially erroneous.

The Missouri Supreme Court Decision in Ricketts Is Legally Wrong.

The court purported to justify the use of the general negligence instruction M.A.I. 24.01 by this Court's decision in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) which held that under the F.E.L.A. there is liability for negligence of a defendant "which plays any part 'even the slightest'" in causing plaintiff's injury. *Ricketts, supra,* 484 S.W.2d at 221.

Despite the Missouri Supreme Court's misplaced reliance on *Rogers,* that case neither authorizes nor mandates jury submission on a general negligence charge, but deals

solely with the issue of causation. As clearly stated by the Court of Appeals for the Third Circuit, "The *Rogers* case did not decide how a judge should instruct a jury in such cases." *Eli v. Reading Co.*, 424 F.2d 758, 762 (3rd Cir. 1970).

The Missouri Supreme Court in *Ricketts* further sought to justify the general negligence submission in F.E.L.A. cases by quoting from *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), stating that only "slight negligence" was necessary to support an F.E.L.A. action, and from Prosser, Law of Torts, §82, that in an F.E.L.A. action, "the extent of the negligence required, as well as the quantum of proof necessary to establish it, [have been reduced] to the 'vanishing point.'" 484 S.W.2d at 221. The *Ricketts* opinion somehow inexplicably translated "slight" negligence into "general" negligence, concepts which are entirely foreign to one another.

In *Boeing, supra,* citing no authority other than Professor Prosser, the court said at 371:

> [4] Slight negligence, necessary to support an FELA action, is defined as "a failure to exercise *great* care . . ."

This holding, of course, is palpably wrong. 45 U.S.C. §51 uses the term "negligence", not "slight negligence." This Court has repeatedly held that the standard of care in an F.E.L.A. case is *ordinary* care. For instance, in *Tiller v. Atlantic Coastline R.R. Co.*, 318 U.S. 54, 67, 63 S.Ct. 444, 451, 87 L.Ed. 610 (1943) this Court said:

> [7, 8] In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and

> prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done.

See also *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 117-118, 83 S.Ct. 659, 665-666, 9 L.Ed.2d 618 (1963) in which this Court reiterated that an F.E.L.A. defendant's duty was ordinary or reasonable care. Thus both *Boeing* and the Missouri Supreme Court decision in *Ricketts* are directly contrary to this Court's decisions, and the declaration of the Missouri Supreme Court, relying solely on *Boeing* and Professor Prosser, is contrary to the clear decisions of this Court. The Missouri Supreme Court's misplaced reliance on those authorities thus is insufficient to justify the clearly disparate treatment accorded F.E.L.A. defendants in the Missouri instruction procedure and affords no basis for classifying F.E.L.A. defendants differently from other corporate employers sued by their employees for negligently inflicted personal injury.

The Missouri Court of Appeals perpetuated this discriminatory and unequal treatment of employer defendants in *Searcy v. Neal*, 509 S.W.2d 755 (Mo.App. 1974). There again an employee sued his employer for a negligently inflicted injury. The employee submitted his case to the jury by an instruction obviously patterned on M.A.I. 24.01. Since defendant was not a railroad subject to the F.E.L.A. the Missouri Court of Appeals held the jury submission and use of M.A.I. 24.01 erroneous and reversed, citing *Ricketts* as its authority. The court in *Searcy* said:

> Instruction No. 2 . . . does not require a finding of a particular unsafe condition which could have been the proximate cause of the injury, and therefore was prejudicially erroneous. * * * The fallability of a negligence

> verdict-director which does not submit the finding of a particular dangerous condition as the proximate cause of the injury is given poignancy by cases, such as this, where the proof asserted by the plaintiff is of more than one unsafe condition.

509 S.W.2d at 762. See also *Todd v. Watson*, 501 S.W.2d 48 (Mo. 1973) at page 49, n. 1.

There Is No Rational or Legitimate Basis for Missouri to Discriminate Against F.E.L.A. Defendants.

There is no rational basis for, and certainly no state interest in, treating F.E.L.A. cases differently from all other negligence cases which Missouri requires be submitted to juries on instructions specifying the negligence charged. It has been made clear by this Court that the action of a state court denying equal protection to one class of parties is action of the state within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 15, 68 S.Ct. 836, 843, 92 L.Ed. 1161 (1948); *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). This Court held over 50 years ago that a plaintiff suing under the F.E.L.A. could not be discriminated against by a state court simply because his rights are to be determined under a federal statute, and Petitioner respectfully suggests that neither may an F.E.L.A. defendant be discriminated against by a state court simply because it is sued under the same federal statute. As this Court has said, "A state may not discriminate against rights arising under federal laws." *McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 234, 54 S.Ct. 690, 692, 78 L.Ed. 1227 (1934).

Even railroads have been held by this Court to be entitled to their constitutional protections. Although the context was different, what this Court said in *Gulf, C. & S.F. Ry. Co. v. Ellis,* 165 U.S. 150, 17 S.Ct. 255, 256, 41 L.Ed. 666 (1897) is equally appropriate here:

> In the suits, therefore, to which they are parties, [railroads] are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection.
>
> * * *
>
> It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States. . . . A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

In yet another context it has been held that a jury instruction and statute authorizing it which limited the right of a railroad to rely on contributory negligence constituted a denial of equal protection in violation of the Fourteenth Amendment. *Wessinger v. Southern Ry. Co.,* 470 F.Supp. 930 (D.S.C. 1979); see also *Georgia Southern & Florida Ry. v. Seven-Up Bottling Co.,* 175 So.2d 39 (Fla. 1965) and *Atlantic Coastline R.R. Co. v. Ivey,* 148 Fla. 680, 5 So.2d 244 (Banc 1941).

The State of Missouri, in subjecting F.E.L.A. defendants unlike any other defendants to what the Missouri Supreme and appellate courts have characterized as "unfair", "prejudicial" and "wholly deficient" submissions of general negligence, clearly denies equal protection in violation of the Fourteenth Amendment.

> . . . the policies of the Equal Protection Clause . . . were intended to secure "the full and equal benefit

> of all laws and proceedings for the security of persons and property" and to subject all persons "to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."
>
> * * *
>
> ". . . When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

McLaughlin v. State of Florida, 379 U.S. 184, 193-194, 85 S.Ct. 283, 289-290, 13 L.Ed.2d 222 (1964).

A state's disparate and unequal treatment of parties similarly situated - here personal injury negligence defendants sued in state courts - can only survive an equal protection challenge if a rational or legitimate basis for different treatment or classification can be shown, and the classification is rationally related to the achievement of a legitimate state purpose. *Western and Southern Life Ins. Co. v. State Board of Equalization of California,* 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981). In the situation in question, however, this Court has commanded that F.E.L.A. defendants be accorded the same procedures as all other defendants sued in state courts. *Mondou, supra; DeAtley, supra; Dice, supra; Dickerson, supra.* Except for its erroneous interpretation of this Court's decision in *Rogers* and its misplaced reliance on the incorrect statement in the Fifth Circuit *Boeing* decision, the Missouri Supreme Court has never attempted to justify its requirement that F.E.L.A. defendants be subjected to the use of the admittedly unfair general negligence charge. It has made no attempt to justify its departure from this Court's decisions in the *Mondou, DeAtley* and *Dice* cases.

It certainly has not stated any rational basis for, nor state interest served by, its discrimination against and unequal treatment of F.E.L.A. defendants, contrary to the clear mandates of this Court. In matters of substantive law the rights of the parties are governed by the federal Act itself and the decisions of this Court. *Rogers, supra.* As to matters of procedure this Court's decisions require that the state courts adhere to the same procedures which they follow in all similar cases. Thus there is no rational or legitimate basis for, or legitimate state purpose served by, Missouri's unequal treatment and classification of F.E.L.A. defendants.

II. Missouri's Jury Instruction Requirement for F.E.L.A. Cases Places an Undue Burden on Interstate Commerce in Violation of Article I, Section 8 of the United States Constitution.

In view of the enormous verdicts so frequently rendered in F.E.L.A. cases, Missouri's action in treating F.E.L.A. defendants differently from other defendants in similar injury cases results in the imposition of an undue and unwarranted burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution. Missouri does not have, nor have its courts attempted to articulate, any local interest or objective to be achieved by the use in F.E.L.A. cases of what the Missouri courts have long called an "unfair" manner of instructing juries.

The Federal Employers' Liability Act by its terms is applicable only to railroads engaged in or whose activities substantially affect interstate commerce. M.A.I. 24.01 is applicable only in F.E.L.A. cases. *Ricketts, supra.* Thus only railroads engaged in or whose activities affect in-

terstate commerce are burdened by the "unfair" and "prejudicial" practice of submitting cases to juries without the slightest specification of negligence, contrary to the state's practice with regard to all other negligence defendants. As this Court recently pointed out in *Arkansas Electric Cooperative Corp. v. Arkansas Public Commission*, 461 U.S. 375, 103 S.Ct. 1905, 1915, 76 L.Ed.2d 1 (1983):

> [7, 8] Even in the absence of congressional legislation, "the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." (Citing cases) . . . It is difficult to square the mechanical line drawn . . . and based on a supposedly precise division between "direct" and "indirect" effects on interstate commerce, with the general trend in our modern Commerce Clause jurisprudence to look in every case to the "nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce."

The sizable awards so routinely upheld in F.E.L.A. cases obviously constitute a burden on interstate commerce, since the resulting judgments are imposed directly upon interstate rail carriers and the cost thereof must be borne by the shipping public. This Court in *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312, 43 S.Ct. 556, 67 L.Ed. 996 (1923) took notice that claims against interstate railroads for personal injuries are numerous, the amounts demanded are large and result directly and indirectly in heavy expense, and held a state jurisdiction statute unconstitutional as imposing an undue burden on interstate commerce.

Far less costly than such damage awards would be the expense of requiring the operation of shorter trains,

yet this Court has specifically held that a state statute purporting to limit the length of trains constitutes an undue burden on interstate commerce contrary to Article I, Section 8 of the Constitution, both because of the additional expense and the inefficiency of operation, and that such enactments are void. *Southern Pacific Co. v. State of Arizona,* 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). A similar result has been reached where cities have attempted by ordinance to limit train length. *Kahn, et al. v. Southern Ry. Co.,* 202 F.2d 875 (4th Cir. 1953); *Oceanview Improvement Corp. v. Norfolk & Western Ry. Co.,* 205 Va. 949, 140 S.E.2d 700 (1965).

If the imposition of a $250 tax unduly burdens interstate commerce as this Court held in *Best & Co. v. Maxwell,* 311 U.S. 454, 61 S.Ct. 334, 85 L.Ed. 275 (1940) it is abundantly clear that the $800,000 verdict and judgment sustained here constitute an undue burden on interstate commerce. Purely local, non-railroad defendants sued in Missouri are not subject to the use of a general negligence instruction such as M.A.I. 24.01 as clearly demonstrated by the Missouri Supreme Court's decision in *Ricketts, supra.* Thus the use of this instruction constitutes at least as clear a discrimination against employers operating railroads in interstate commerce as did the merchants' tax imposed only on nonresident merchants in *Best & Co., supra.*

In *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) this Court found a state administrative order which would have imposed a $200,000 expense on a cantaloupe grower an impermissible burden on interstate commerce, even though it did not discriminate in favor of local companies, there being no sufficiently legitimate local purpose to be served. See also *Raymond Motor Transport, Inc. v. Rice,* 434 U.S. 429,

98 S.Ct. 787, 54 L.Ed.2d 664 (1978) and *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) in which substantial expense, together with other restrictions imposed by states, was held to burden interstate commerce unconstitutionally.

Petitioner submits that the Missouri Supreme Court in its jury instruction practice denies to interstate railroads, including Petitioner, the equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution, and improperly imposes an undue burden on interstate commerce in violation of the Commerce Clause, Article I, Section 8 of the Constitution, and that such practice is contrary to the clear pronouncements of this Court.

CONCLUSION

For all of the above reasons, Petitioner respectfully urges this Court to grant this petition for the issuance of this Court's writ of certiorari.

Respectfully submitted,

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APPENDIX

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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. 48301

HAROLD E. ANDERSON,
Plaintiff-Respondent,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Daniel T. Tillman, Judge

OPINION FILED: September 24, 1985

Burlington Northern Railroad Company (railroad) appeals from a judgment in favor of Harold E. Anderson pursuant to a jury verdict of $800,000.00 in a personal injury action filed against the railroad pursuant to § 45 U.S.C. §§ 51 et seq., the Federal Employers' Liability Act. Anderson sought damages for injuries incurred when a steel shaving got into his eye as he was reaming bolt holes on a hopper car assembly line. We affirm.

This is the second appeal following retrial ordered by us in Anderson v. Burlington Northern Railroad, 651 S.W.2d 176 (Mo.App. 1983) from which we borrow freely without quotation marks the following recitation of facts. Anderson was an employee of the railroad. His duties required him to ream bolt holes in the metal flooring of

hopper cars. He used an air-powered reamer, the exhaust from which caused the metal shavings to be blown into his face at times. He wore safety glasses or spectacles but they did not prevent particles of metal from being blown into his eyes. The evidence was conflicting regarding the availability to Anderson, and the use by other employees, of various types of safety goggles. On May 6, 1977, while reaming a hole with the exhaust blowing in his face, Anderson felt a pain in his left eye. After finishing the last hole, he went to his foreman, obtained eye wash, and washed his eye. His eye continued to hurt over the weekend. Despite the continued eye irritation, he worked on Monday. On Tuesday when he returned to work, he was sent to a doctor who removed a piece of metal from his eye and attempted to clean the eye by drilling into it. While Anderson continued to work, he also visited the doctor because of pain. About two weeks later, on May 22, Anderson was admitted to the hospital. Surgical efforts to save his eye were unsuccessful; it was eventually removed and replaced with a prosthesis, a plastic eyeball.

The railroad raises nine points on appeal alleging that the trial court erred in the following: (1) refusing to grant a motion for directed verdict or judgment notwithstanding the verdict because Anderson failed to prove that the railroad's negligence caused his injuries; (2) denying a mistrial where the jury surmised that the failure to grant Anderson's request to excuse certain jurors was at the railroad's insistence; (3) failing to discharge the jury or declare a mistrial following a witness' testimony of the railroad's racial bias against the witness, thereby prejudicing the jury against the railroad; (4) admitting Anderson's testimony that the railroad forced his return to work the day after his medical treatment and continued to supply inadequate or ineffective safety goggles to him;

(5) admitting certain incompetent medical testimony; (6) admitting testimony by an economist concerning Anderson's past and future loss of wages; (7) denying the motion for new trial or remittitur for an excessive jury verdict; (8) giving a negligence instruction based on M.A.I. 24.01; and (9) refusing to give the railroad's proffered comparative negligence instruction.

We shall set out additional facts only as needed. Railroad's first point contends Anderson failed to make a submissible case. The standard of review to be used in determining whether sufficient evidence has been presented in order to make a submissible case is well established. We must view the evidence in the light most favorable to the plaintiff and disregard defendant's contrary evidence. White v. St. Louis-San Francisco Ry., 602 S.W.2d 748, 751 (Mo.App. 1980).

There is no question that Anderson sustained an injury as a result of a piece of steel being embedded in the cornea, near the center of his left eye. Railroad argues that, although Anderson established that the safety glasses issued him by the railroad had gaps which would allow debris to get behind the glasses, no evidence established that the steel particle got in Anderson's eye while he was actually working. Railroad presents other possibilities explaining how the steel particle fell in Anderson's eye. Noting that even if a man had on goggles or a face shield recommended by experts on eye protection, if he took them off and wiped his forehead because he was hot, a piece of metal could be shaken from his eyebrows, forehead, or gloves; be rubbed into the eye; and be forced in by the eyelid.

Testimony by Anderson established that the safety glasses issued to him and worn by him at the time of his

injury were essentially spectacles, horn-rimmed glasses with perforated plastic side shields. He testified metal shavings, blown by the exhaust from the reamer, would get in his clothes, hair, face, eyebrows, in the vicinity of the eyes, and in the eyes of other workers on numerous occasions through the gaps at the top and bottom of the eyeglass frame, at the brow, around the cheeks and adjacent to the nose. Several other men, employed similarly to Anderson, had complained about getting shavings in their eyes while wearing the safety glasses. Anderson also testified that while working he felt a pain in his eye. Ample evidence was before the jury on this matter for it to conclude that the railroad's negligence in furnishing inadequate eye protection caused Anderson's injuries, despite the railroad's alternative explanations for causation on how the injury occurred. Point denied.

The railroad's second point alleges error in the denial of its motion to discharge the jury. During the voir dire of the jury panel, one of the male jurors, Mr. Webbe, informed the court he was allowed only one week's paid absence from his employment for jury duty. Despite his willingness to contribute the second week as a civic obligation, he was concerned over the possibility of the trial going into a third week. Out of the hearing of the jury the court advised the attorneys that if they believed Webbe's ability to concentrate on the case could be affected, the court would release him if both agreed. Anderson's counsel approved. The railroad's counsel, mindful that few men were on the panel and, more importantly, that Webbe used both air electric drills and reamers requiring him to wear eye protection in his employment, refused his consent to excuse Webbe.

The proceedings returned to the hearing of the jury and Anderson's counsel inquired of Webbe whether there

was "a problem inasfar as you are concerned." Webbe again repeated that he would get paid only for five days. Anderson's counsel thereupon moved "that the juror be dismissed, we have extra jurors down here," notwithstanding the preceding bench conference where the railroad's counsel had refused his consent to excuse Webbe. Immediately thereafter, the railroad's counsel approached the bench and, out of the hearing of the jury, moved to discharge the jury panel stating Anderson's attorney was guilty of a deliberate attempt to prejudice the jury against the railroad. The motion was denied. The railroad argues the actions of Anderson's counsel curried favor with the jury, especially with Webbe, by revealing that Webbe was retained at the railroad's insistence, despite Anderson's willingness to excuse him.

Neither Webbe nor the panel was ever advised in any manner that the railroad objected to or opposed Webbe's being excused. Earlier during the course of the voir dire examination, the trial court had determined not to excuse another venireman because of job problems. In the eyes of the jury, the trial court, not the attorneys, made the final determination not to excuse Webbe. The court exercised its discretion in the manner requested by the railroad by denying Anderson's motion to excuse Webbe. The railroad's determined efforts to have Webbe retained on the panel were successful. Regardless of railroad's characterization of the remark made by Anderson's counsel, the record fails to support that either Webbe or the entire jury panel perceived that it was at the railroad's insistence that Webbe was not excused, thereby engendering their prejudice against the railroad. The trial court is vested with broad discretion in the control of counsel's conduct during voir dire and his ruling thereon will not be disturbed unless the facts indicate a manifest

abuse of discretion, Missey v. Kwan, 595 S.W.2d 460, 462 [2] (Mo. App. 1980), because the trial court is in a better position to gauge the effect on the jury panel of the matter claimed to be prejudicial, *see* Smith v. Aldridge, 356 S.W.2d 532, 536 (Mo. App. 1962). The trial did not exceed two weeks, so Webbe incurred no undue hardship by his jury service; therefore, we find no prejudice to the railroad and no abuse of discretion by the trial court. The incident certainly does not warrant reversal. Everett v. Bishop, 680 S.W.2d 779, 781 (Mo. App. 1984).

In the same point railroad also complains of the actions of Anderson's attorney concerning Mr. Winkelman, a juror, who had advised the court near the end of the trial he would lose his job if the trial went into a third week. On the final Thursday of the second week, the court requested the jury to determine whether it wished to complete the case on Saturday or Monday. The jury voted for Monday whereupon the court advised them, since Winkelman "would lose his job if he had to come back Monday," their selection of Monday would require that the alternate juror be substituted. A recount produced the same result. The court then requested to know whether the substitution for Winkelman could be made. Railroad's attorney asked to approach the bench. Out of the jury's hearing, railroad's attorney stated he did not wish to make the decision to excuse Winkelman. At his request, the decision to excuse Winkelman was deferred until the following morning, on Friday, so that Winkelman's employer could be contacted. Proceedings resumed before the jury. After they were eventually excused on Thursday for the evening, the court learned Winkelman would be available Monday if he worked Saturday. The railroad claims the occurrence prejudiced it by placing railroad in the position of being the "villain" by requiring Winkelman to stay

on Monday and lose his job merely because railroad desired to keep Winkelman, one of the only two males on the jury panel. The record reveals no objection during this scenario was made by railroad. We review the incident for "plain error." Rule 84.13(c).

The requisite prelude to plain error review occurs where the circumstances are characterized as having engendered hatred, passion or prejudice resulting in manifest injustice or a miscarriage of justice. Executive Jet Management & Pilot Service, Inc. v. Scott, 629 S.W.2d 598, 607[7] (Mo. App. 1981). Nothing in the record reflects that the jury knew the railroad was willing to retain Winkelman on the panel at the expense of his job, because the proceedings were conducted outside the hearing of the jury. The jury was not informed that the railroad might not consent to Winkelman's being excused. The decision pertaining to Winkelman was expressly postponed to the following morning where the court learned the problem was resolved and that Winkelman could finish his jury service without jeopardizing his job. No decision was made to keep Winkelman as a juror and have him lose his job. No showing exists of any prejudice to the railroad tantamount to manifest injustice or a miscarriage of justice. The railroad's second point is denied.

The railroad's third point alleges error for the failure of the trial court to discharge the jury and declare a mistrial following a witness's testimony implying the railroad's racial bias against him, thereby prejudicing the railroad because seven of the twelve jurors were black. Mr. Davenport, a black man and one of Anderson's coworkers, was called by Anderson as a witness and testified generally to the working conditions at the time of Anderson's injury. During direct, cross and redirect examination, no mention or reference to race was elicited. On

re-cross examination, the railroad's counsel attempted to impeach Davenport's testimony that he did not "have time to see what everybody else was doing." The following colloquy occurred:

Q. [By Mr. Mullen] All right. I think that's all. You say you didn't have time to do anything but work eight solid hours a day on the hopper line reaming these holes. Mr. Davenport, did you ever get in trouble for coming in late, leaving early for lunch?

MR. FRIEDMAN: Pardon me, Your Honor. I don't think that has any bearing.

THE COURT: Sustained. The jury is instructed to disregard that.

Q. (By Mr. Mullen): Well, may I ask, Mr. Davenport, did you from time to time leave the hopper line to go over and engage in social telephone calls in the office?

A. Telephone calls in the office?

Q. Yeah, right.

MR. FRIEDMAN: Again, your Honor.

THE COURT: Overruled, cross examination. Go ahead.

Q. (By Mr. Mullen): And get called down for it?

A. Called down for what, telephone calls?

Q. Yeah, right, right.

A. Mr. Mullen, they tried to get on me for anything. I was the only black person in that shop just about. You know, anything they could catch me

> trying to do they would try to get rid of me. Back in '77 they didn't want me to work there in the first place, that's why they gave me a little peon job because they thought I would quit but I didn't.

The railroad made no objection or motion to strike Davenport's answers; instead, counsel continued his line of questioning whether disparate racial treatment had occurred. Again, when the witness stated that he "didn't quit. I got laid off, you know," the railroad's counsel inquired whether or not it was true that everyone else with his seniority or less had likewise been laid off. Davenport responded:

> [Y]ou don't see my point. I'm saying one toad out of a hundred and twenty you're definitely going to see me. I don't care what I do you're going to see me mess up. I don't care what it is because I stick out like a fly in a churn of buttermilk, they were on me all of the time.

Following additional questioning during the re-cross and further redirect examination by Anderson's attorney, Davenport was finally excused. The railroad's counsel then complained Davenport's remarks were gratuitous and non-responsive, and requested a mistrial which the trial court denied. The trial court did instruct the jury to disregard the testimony pertaining to race.

When a witness unexpectedly volunteers an inadmissible statement, the action called for rests largely within the discretion of the trial court who must evaluate the situation and ascertain if some remedy short of a mistrial will cure the error, and appellate review of the trial court's decision is to verify that the trial court has not abused its discretion. 629 S.W.2d at 611[37]. A declaration of a mistrial is the most drastic remedy for trial error

and should be granted only in those cases where the error is so prejudicial that its effect can be excised in no other way. *Id.* [38]. The trial court was in a superior position to assess whether his admonition to the jury was sufficient to lessen the sting of the witness's comments invited by the railroad's line of inquiry. We find no abuse of the trial court's discretion in denying the railroad's motion for mistrial. Point denied.

The railroad's fourth point claims error in the admission of Anderson's testimony that he was "forced" to return to work the day following his initial medical treatment and of his counsel's comments in his opening statement to the effect that the railroad continued to furnish Anderson with ineffective eye protection upon his return despite his surgery. Railroad states the foregoing evidence was irrelevant and prejudiced the jury against the railroad. The gist of the railroad's argument is that Anderson did not present sufficient evidence to establish a causal connection between his eye infection and his alleged "forced" return to work. The railroad also argues that the evidence was improper because it permitted the jury to infer Anderson's return to work caused or contributed to the infection in his eye causing its eventual removal.

At trial the railroad had requested by motion in limine to exclude any testimony, evidence, or statement that the railroad in any manner forced Anderson to return to work following his initial medical treatment. The trial court denied the motion. When Anderson began to testify at trial about the events prompting his return to work following his initial medical treatment, the railroad objected on the ground that Anderson's testimony was improper and outside the scope of the pleadings. The trial court sustained the objection prompting Anderson's at-

torney to suggest the court review the pleadings. In the railroad's answer to Anderson's first amended petition, the railroad alleged as an affirmative defense that Anderson voluntarily continued his work duties and subjected himself to an increased likelihood of infection and injury without being required by the railroad to do so and without making known to the railroad the extent of his symptoms or condition of his eye. Subsequently, the judge overruled the railroad's further objection on relevancy that the evidence failed to indicate a connection between Anderson's return to work and the subsequent eye infection.

The evidence admitted is relevant and probative on the issues whether Anderson's return to work was a result of the railroad's negligence or Anderson's actions as alleged. No effort was made by the railroad to limit by instruction the purpose for which the jury considered this evidence. We deny railroad's fourth point.

The railroad's fifth point contends certain medical evidence was improperly admitted. Without addressing whether such evidence was improperly admitted, our review of the trial record reveals that the deposition of another medical expert containing substantially the same evidence complained of here had previously been read to the jury with no objection by the railroad. One cannot be heard to complain of the admission of testimony over his objection, where evidence of the same tenor has been admitted without his objection. Laughlin v. Kansas City Southern Ry., 275 Mo. 459, 205 S.W. 3, 8[13] (1918); Mathews v. Chrysler Realty Corp., 627 S.W.2d 314, 319[7] (Mo. App. 1982). We need not further address the railroad's complaint. Point denied.

The railroad's sixth point alleges error in the admission of testimony and exhibits concerning Anderson's past and

future wage losses and the trial court's refusal to give withdrawal instructions because the testimony constituted speculation and was not supported by competent evidence. The expert testified extensively from the exhibits but the record on appeal does not contain those exhibits whose accuracy the railroad disputes. Railroad argues that the expert witness's calculations were based on speculative assumptions, and challenges the expert's conclusion that spray painters' wages and carmen's wages would both increase in the future. Railroad states that the expert gave no basis for his conclusion about spray painters' wages and that his explanation for carmen's future wage increases was incomprehensible. Railroad concludes that the jury was induced to return an excessive verdict by the speculative testimony concerning damages. We do not agree.

The ultimate test for damages is whether the award will fairly and reasonably compensate the plaintiff for his injuries. Sampson v. Missouri Pacific R.R., 560 S.W. 2d 573, 588[25] (Mo. banc 1978). Anderson's expert witness, an economist and economics professor, testified concerning Anderson's past and future wage loss. The expert calculated $136,652.00 to be Anderson's past wage loss from the time of his injury to the time of trial, a period of 6-1/2 years, based on an hourly rate in a 40 hour week paid to a journeyman-carman. He reduced this figure by twenty percent, the difference between the wages paid a journeyman-carman and an apprentice helper such as Anderson, and then he subtracted all actual earnings of Anderson from May, 1977 to October 31, 1983. After making the two subtractions, he calculated Anderson's past wage loss to approximately $80,843.00. No addition was made for salary increases likely to accrue to Anderson as he approached journeyman status during the completion of his apprenticeship during this period. Since Anderson

had also worked as a custom spray painter for automobiles and tractor trailers, the expert witness offset Anderson's alternative income potential as a custom spray painter against any deduction which might otherwise be required for layoffs or furlough periods on the railroad when Anderson would not have earned wages. The expert's personal knowledge that spray painters in Missouri earned $20.00 an hour, plus fringe benefits was corroborated by another witness, a former seller of trucks and trailers in Springfield, Missouri, for whom Anderson had done custom spray painting prior to his accident.

The extent of future harm to the earning capacity of the injured person is measured by the difference as of the time of trial between the value of plaintiff's services as they would have been in view of the injury and as they would have been had there been no injury. *Id.* at 589[27]. A figure for loss of wages is not to be permitted when formed from speculation and conjecture, but only when established with reasonable certainty upon which substantial evidence must be introduced. *Id.* [28].

The expert's calculation of future wage loss used two figures, $26,894 per year, based on Anderson's rate of pay as a carman (or a spray painter earning at least that much), and $6,968 annually, based on the minimum wage at the time of trial for entry level work based on testimony by a rehabilitative counselor that Anderson's employment was limited to entry level positions not intellectually demanding. The $19,926 difference between these two annual wages represented Anderson's annual wage loss basis for the future. The expert witness computed the present value of Anderson's future earnings as a carman at three different retirement ages, figuring that Anderson at age 25 would likely retire at the age of 62, 67, or 70 years. To compute the present value of Anderson's future loss of

income, the expert reviewed carmen wages from 1962 to 1983 and arrived at an annual wage percentage increase and then, based upon the relationship of past wage increases to interest rates on tax free high grade bonds, taking inflation into account, demonstrated that the rate of increase of carmen's wages on the average for the past twenty years was greater than the increase in interest rates by about 2%. He adusted the 2% differential downward to 1-1/2% due to current rising interest rates. No specific projections of exact interest rates, wage increases, or inflation were made. The witness testified he could not predict the future rate of inflation and interest, but indicated the relationship between interest rates, wage increases, and inflation has been historically constant.

After computing the present value of future carmen earnings for the three retirement ages of 62, 67, and 70, the expert computed the present value of future minimum wage earnings at the three retirement ages. He subtracted the lesser, minimum wage figures from the future carmen earnings to derive the present value of the future wage loss at the three retirement ages. To each of these, he added the approximate $80,843.00 past wage loss to derive Anderson's total wage loss, both past and future (presently valued), resulting in a total wage loss of $876,562 at age 62; $997,285 at age 67; and $1,071,079 at age 70. Fringe benefits were not included in the calculations to offset the tax consequences.

Inevitably there is a degree of speculation to the determination of a fairly approximated present-value award compensating plaintiff for what he would have earned but for his injury, but we do not find such speculation, when based upon the use of facts in reasonable calculations, to be so purely conjectural as to improperly in-

fluence the jury's verdict as to damages. *Id.* The expert's calculation of damages based on a correlation between interest rates and earnings is a projection; nevertheless, it is a prediction based upon reasonable certainty. The railroad's excerpts from cross-examination reflect its intent to undermine the methodology of the economist. However, the relative weakness or strength of the factual underpinning of the expert's opinion goes to the weight and credibility, rather than admissibility. Hall v. W.L. Brady Investments, Inc., 684 S.W.2d 379, 388[8] (Mo. App. 1984). The trial court did not err in admitting the expert's testimony or in refusing to give railroad's proffered instructions withdrawing evidence of Anderson's past and future wage losses.

The railroad's seventh point claims error in the denial of its motion for new trial for the failure to grant a remittitur, contending the $800,000.00 verdict was excessive and indicative of jury prejudice against the railroad. The trial court may find passion and prejudice by the jury from the excessiveness of the verdict alone. White v. St. Louis San Francisco Ry., 602 S.W.2d at 754[5]. When the trial court has made no such finding, the appellate court will defer to the trial court and will not make a finding of passion or prejudice from the amount of the verdict alone. *Id.* [6]. Here the railroad argues that two errors already raised in this appeal induced prejudice in the jury. The errors defendant highlights include the testimony of Anderson's economist about Anderson's future wage loss and the testimony of Anderson's fellow employee imputing racial bias to the railroad. Since we have already ruled against the railroad on these alleged errors which underpin this charge of error, we likewise rule against the railroad on this point. *Id.* at 755.

The railroad alternatively contends that if we reject its claim that the verdict was a result of prejudice of the jury, we should find under the rule of uniformity that the verdict was excessive and remit it by one-half. Under these circumstances, we find the recent pronouncement that the doctrine of remittitur is abolished in Missouri controls. *See* Firestone v. Crown Center Redevelopment Corporation, 693 S.W.2d 99, 110[14] (Mo. banc 1985). Railroad's request for remittitur is denied.

Railroad's eighth contention is that the trial court erred in submitting M.A.I. 24.01 as the verdict director because the instruction, by submitting general negligence and not specific negligence, gave the jury a roving commission and because the instruction denies railroads engaged in interstate commerce equal protection of the law. Railroad has lost, as it candidly admits in its brief, the "roving commission" argument before the Missouri Supreme Court. Bair v. St. Louis-San Francisco Ry., 647 S.W.2d 507, 510-511[5] (Mo.banc), cert. denied sub nom., Burlington Northern, Inc. v. Bair, ... U.S. ....., 104 S.Ct. 107, 78 L.Ed.2d 109 (1983); Ball v. Burlington Northern Ry., 672 S.W.2d 358, 361[1] (Mo.App.1984). We have no alternative but to deny railroad's point.

Railroad also contends the giving of M.A.I. 24.01 denied it equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution because the instruction singles out and imposes greater liability and burdens upon interstate railroad carriers than it does any other corporate or private individual defendant. The constitutional attack based on the equal protection argument on the instruction has been raised before and summarily rejected. *See* Fravel v. Burlington, 671 S.W.2d 339, 341 (Mo.App.1984), cert. denied sub

nom. Burlington Northern Ry. Co. v. Fravel, ... U.S. ....., 105 S.Ct. 907, 83 L.Ed.2d 921 (1985). Point denied.

In its final point, railroad contends the trial court erred in refusing to give its tendered verdict form, a combination of M.A.I. 36.01 and 36.15, requiring the jury to separately state the total amount of damages and the percentage of fault attributable to Anderson and the railroad. Instead, the trial court gave M.A.I. 36.01 as its verdict form, in addition to M.A.I. 24.01 (verdict director - F.E.L.A.), M.A.I. 8.02 (damages - F.E.L.A.), and M.A.I. 32.07 (affirmative defense - contributory negligence - F.E.L.A). Railroad argues that since our Supreme Court adopted apportionment of fault among joint tortfeasors in Missouri Pacific Railroad Co. v. Whitehead & Kales Co., 566 S.W.2d 466, 473 (Mo.banc 1978) and comparative fault between plaintiff and tortfeasor, Gustafson v. Benda, 661 S.W.2d 11 (Mo.banc 1983), F.E.L.A. cases should be governed by the same process, so that the use of its tendered verdict form should be mandatory. We disagree.

M.A.I. 36.15 was proposed following the decision in *Whitehead & Kales.* While normally the jury inserts on the verdict form the names of parties found liable, the Note on Use #6 to M.A.I. 36.15 specifically requires the preparer of the form to insert the names. The Committee's Comment states the purpose of Note on Use #6 is to forestall any attempt on the part of the jury to assign any part of the fault to the plaintiff. The instruction conforms to the holding in *Whitehead & Kales* which apportioned fault only between joint tortfeasors, and not the tortfeasor and plaintiff. *Gustafson,* decided after the present case, specifically states its applicability was to operate prospectively only. 661 S.W.2d at 15. Thus, the trial court here had no alternative but to give M.A.I. 36.01 as its verdict form. Its actions were proper. Rule 70.02(b).

As a sub-point, railroad also contends that the failure of the trial court to give its verdict form violates the Fourteenth Amendment to the United States Constitution and constitutes an undue burden on interstate commerce in violation of Article I, Section Eight of the Commerce Clause. The constitutionality of the Federal Employers' Liability Act has been repeatedly upheld and we find no reason to question the constitutionality of the verdict form.

Judgment affirmed.

/s/ Paul J. Simon
Paul J. Simon, Presiding Judge

/s/ Albert J. Stephan, Jr.
Albert J. Stephan, Jr.
Chief Judge Concurs

/s/ Harold L. Lowenstein
Harold L. Lowenstein
Special Judge Concurs

(Filed October 9, 1985)

ED No. 48,301

IN THE
MISSOURI COURT OF APPEALS,
EASTERN DISTRICT
Division 2

HAROLD E. ANDERSON,
Plaintiff-Respondent,

vs.

BURLINGTON NOTHERN RAILROAD COMPANY,
Defendant-Appellant.

APPELLANT'S MOTION FOR REHEARING, OR REHEARING EN BANC, OR FOR TRANSFER TO THE SUPREME COURT OF MISSOURI

Appellant, Burlington Northern Railroad Company, respectfully moves the Court to set aside its decision and opinion in the above-styled cause and grant a rehearing of this case either in Division or in this Court en banc, in accordance with Supreme Court Rule 84.17. In the alternative, appellant moves the Court to transfer this case to the Missouri Supreme Court in accordance with Supreme Court Rule 83.02.

MOTION FOR REHEARING

Appellant moves for rehearing in Division, or by the Court en banc, upon the following grounds:

* * *

4. The Court, as shown by its opinion, overlooked a material matter of law raised by appellant with respect

to respondent's verdict-directing instruction patterned after MAI 24.01, namely that the use of said instruction in FELA cases but in no other class of cases imposes an undue burden on Interstate Commerce contrary to Article I, §8 of the United States Constitution. Although the Court mentions in the opinion at pages 13 and 14 appellant's equal protection argument and disposes of same simply by saying this point has previously been considered by the Missouri Supreme Court, the opinion contains no discussion whatever concerning appellant's point that the use of said instruction improperly burdens Interstate Commerce and neither the opinion nor any case cited by the Court deals with the merits of appellant's equal protection argument under the Fourteenth Amendment to the United States Constitution. Having thus overlooked one extremely material question of law and avoided the merits of the other, this Court, or the Court en banc, should grant appellant a rehearing for the purpose of deciding these issues.

ALTERNATIVE MOTION FOR TRANSFER TO SUPREME COURT

Appellant Burlington Northern Railroad Company alternatively moves this Court to transfer this appeal to the Supreme Court of Missouri pursuant to Supreme Court Rule 83.02, upon the following grounds:

1. The issue of the propriety of MAI 24.01 as the verdict-directing instruction to be given in FELA cases is a question of general interest and great importance to all interstate common carriers by railroad operating in the State of Missouri, and to their employees who may sustain injuries, and should be re-examined because:

A. The propriety of a verdict-directing instruction in the form of MAI 24.01 made applicable only to

interstate railroads needs to be re-examined by the Missouri Supreme Court in light of the constitutional issue raised for the first time in this case, namely that the use of such instruction imposes an undue burden on Interstate Commerce contrary to Article I, §8 of the United States Constitution.

B. The issue of whether MAI 24.01, used as the verdict-directing instruction only in FELA cases, denies to interstate railroads the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution, alhough previously raised in other cases, has never been discussed on its merits in any opinion of this Court or the Missouri Supreme Court, but is an issue of general interest and importance and needs to be re-examined and considered on its merits by the Missouri Supreme Court.

* * *

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Attorneys for Appellant

AFFIDAVIT OF SERVICE

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

Two copies of the foregoing motion together with suggestions in support thereof were served on this 9th day of October, 1985, by delivering same to:

Mr. C. Marshall Friedman
Friedman, Weitzman & Friedman, P.C.
The Advocate Building
1133 Pine Street
St. Louis, MO 63101
Attorneys for Respondent

/s/ Robert P. Schmidt

Subscribed and sworn to before me this 9th day of October, 1985.

My Commission Expires: July 5, 1989

/s/ Richard U. Schmidt
Notary Public

MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: Attorneys of Record — Page one of one

RE: Motions for Rehearing/ Transfer - Denied — FROM: Deirdre O. Ahr
DATE: October 28, 1985

1. 48301 – Anderson, Harold E. — Resp vs.
Burlington Northern RR Co. — App.

* * *

IN THE SUPREME COURT OF MISSOURI

No. 67620

HAROLD E. ANDERSON,
Plaintiff-Respondent,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellant.

APPELLANT'S APPLICATION FOR TRANSFER TO THE SUPREME COURT OF MISSOURI

Comes now appellant pursuant to Supreme Court Rule 83.02 et seq. and moves this Court to enter its Order transferring the above case from the Missouri Court of Appeals, Eastern District, where it bore Docket No. ED48,301, to this Court because of the general interest and importance of the questions involved in the case and for the purpose of re-examining the existing law, and states:

1. That the Missouri Court of Appeals, Eastern District, filed an opinion in this case September 24, 1985, copy of which is attached to and filed with this motion.

2. That appellant timely filed its motion for rehearing or for rehearing en banc or for transfer to this Court October 9, 1985, copy of which motion is attached hereto and filed herewith.

3. That on October 28, 1985 the Missouri Court of Appeals, Eastern District, denied said motion. Copy of the notice of said action is attached hereto and filed herewith.

4. This appeal is from a judgment in favor of plaintiff-respondent in an action brought pursuant the Federal

Employers' Liability Act, 45 U.S.C.A. §§51 et seq. The trial court submitted to the jury the issues of negligence of appellant and contributory negligence of respondent under the comparative negligence requirements of that Act, and refused a comparative negligence form of verdict submitted by appellant.

5. That in submitting the case to the jury the trial court gave an instruction in the form of M.A.I. 24.01 over appellant's objection that said instruction gave the jury a roving commission, submitted general negligence instead of specific negligence as required in all cases other than FELA cases and thereby denied to defendant-appellant the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution and over appellant's further objection that the use of said instruction imposed an undue burden on interstate commerce in violation of Article I, §8 of the United States Constitution.

6. The propriety of a verdict-directing instruction in the form of M.A.I. 24.01 used only in FELA cases against interstate railroads should be re-examined by this Court in light of the constitutional issues raised, namely that the use of said instruction denies to interstate railroads the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution and imposes an undue burden on interstate commerce contrary to Article I, §8 of the United States Constitution. The Fourteenth Amendment issue, although previously raised in other cases, has never been discussed on its merits in any opinion of this Court or any of the districts of the Court of Appeals and the use of said instruction should be re-examined and considered on its merits by this Court. This is an issue of general interest and importance to all interstate railroads subject to suit in Missouri, and to all

of their employees who may bring actions pursuant to the FELA.

7. The use of M.A.I. 24.01 submitting general negligence in FELA cases deprives interstate railroads subject to the Act of the requirement applicable in all other negligence cases in Missouri which require the jury to find specific negligent acts or omission of defendant causing or contributing to plaintiff's injuries and thus makes it easier for plaintiffs to obtain verdicts in FELA cases. This imposes an undue burden on interstate commerce, as demonstrated by the fact that verdicts totaling in excess of three million dollars have been returned against appellant alone in six FELA negligence cases (including this case) which have been affirmed by the appellate courts of Missouri since January 1, 1984 as demonstrated by the reports of decisions appearing in the Southwestern Reporter system.

* * *

WHEREFORE, appellant prays the Court to order this case transferred to the Supreme Court of Missouri because of the foregoing issues of general interest and importance and for the purpose of re-examining the existing law of Missouri with respect to the use of M.A.I. 24.01 in the face of the constitutional challenges which appellant has made to it, and to determine and rule the issue of the appropriate form of verdict to be used both in FELA cases and all other comparative negligence cases.

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No. 67620

ED 48301

IN THE SUPREME COURT OF MISSOURI

September Session 1985

Harold E. Anderson,
Plaintiff-Respondent,
vs. TRANSFER
Burlington Northern Railroad Company,
Defendant-Appellant.

Now at this day, on consideration of Defendant-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1985, and on the 17th day of December 1985, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 17th day of December, 1985.

/s/ Thomas F. Simon
Clerk

STATE OF MISSOURI)
) ss.
City of St. Louis.)

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
MANDATE

No. 48301

HAROLD E. ANDERSON,
Respondent,

VS

BURLINGTON NORTHERN
RAILROAD COMPANY,
Appellant.

Circuit Court of the City of St. Louis
No. 782-6694, Div. 5

The Court, being now sufficiently advised of and having considered the premises, adjudges that the judgment rendered herein by the Circuit Court of the City of St. Louis in its cause No. 782-6694 be affirmed and stand in full force and effect in accordance with the opinion of this Court herein delivered September 24, 1985. Opinion by Paul J. Simon, Presiding Judge, concurred in by Albert J. Stephan, Jr., Chief Judge, and Harold L. Lowenstein, Special Judge.

STATE OF MISSOURI, ss.

I, DEIRDRE O'MEARA AHR, Clerk of the Missouri Court of Appeals, Eastern District, certify that the above and foregoing is a full, true and complete transcript of the

judgment rendered in the above entitled cause, as fully as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis this 18th day of December 1985.

/s/ Deirdre O. Ahr
Clerk, Missouri Court of Appeals, Eastern District.

INSTRUCTION CONFERENCE HELD BEFORE HON. DANIEL T. TILLMAN IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS PRIOR TO SUBMISSION TO THE JURY

MR. MULLEN: Is your Honor now going to make the record on the instructions to be given?

THE COURT: Okay. I have tendered to the lawyers instructions 1 through 10 and they have voiced no objections as to the sequence, as to which instructions are being given. Is that right, Mr. Friedman:

MR. FRIEDMAN: Yes, sir.

THE COURT: Is that right, Mr. Mullen?

MR. MULLEN: Yes, Your Honor.

THE COURT: Do you have a statement concerning the instructions?

MR. MULLEN: Yes, Your Honor. Without waiving any specific complaints concerning any of the instructions or as to the submissibility to the case generally, at this time I do want to make a record that the defendant objects to instruction number six which is patterned after MAI 24.01, because it gives the jury a roving commission and constitutes a submission of general negligence, MAI 24.01 discriminates against railroad defendants operating in interstate commerce which makes them subject to the Federal Employers' Liability Act, and imposes an improper burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution Article I, Section 8, and fails to give to railroads which deal in interstate commerce the equal protection of the law with other employers sued for personal injury.

The plaintiff is singling such railroad out for disparate treatment in violation of the Equal Protection Clause of the U.S. Constitution and the Fourteenth Amendment to the Constitution since in no other situation is the giving of such general negligence or roving commission type of instructions permitted by MAI in any similar context whatever.

(Tr. on App. pp. 1438-1440)

(Filed October 17, 1983)

INSTRUCTION NO. 6

Your verdict must be for plaintiff if you believe:

First, defendant either failed to provide: reasonably safe conditions for work, or reasonably safe appliances, and

Second, defendant in any one or more of the respects submitted in Paragraph First was negligent, and

Third, such negligence resulted in whole or in part in injury to plaintiff.

Instruction Given

/s/ Daniel T. Tillman
Daniel T. Tillman

MISSOURI APPROVED INSTRUCTIONS

FEDERAL EMPLOYERS' LIABILITY ACT 24.01

24.01 [1981 Revision] Verdict Directing—F.E.L.A.—Failure to Provide Safe Place to Work

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce,[1]
and

Second, defendant either failed to provide:[2]
reasonably safe conditions for work, or
reasonably safe appliances, or
reasonably safe methods of work, or
reasonably adequate help, and[3]

Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent,[4] and[5]

Fourth, such negligence[4] resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].

*[unless you believe plaintiff is not entitled to recover by reason of Instruction Number ..... (*here insert number of affirmative defense instruction*)].

Committee's Comment (1978 New)

In an F.E.L.A. case, common law negligence rules are controlling *except* that these rules have been abrogated by F.E.L.A. Because of the "in whole or in part" language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only

the *slightest* cause of the employee's injury. *Rogers v. Mo. Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

In the traditional negligence case, it is mandatory for the plaintiff to include the word "direct" or "directly" in his instruction because of the proximate (direct) cause requirements. This prevents the jury from awarding damages or finding for plaintiff because of some indirect or contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. "was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Mo. Pac. Ry.*, supra, 352 U.S. 500, 507. The test of a jury case under F.E.L.A. is simply "whether the proofs justify within reason the conclusion that employer's negligence played *any part, even the slightest,* in producing injury or death for which damages are sought." (emphasis added). *Rogers v. Mo. Pac. Ry.*, supra, 352 U.S. 500, 506. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater v. C & O Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir. 1974).

As the United States Supreme Court has stated in *Rogers v. Mo. Pac. Ry.*, supra, in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common law. Our state Supreme Court has consistently held that the federal interpretation of F.E.L.A. is binding on the Missouri state courts. *Headrick v. Kansas City Southern Ry.*, 305 S.W.2d 478 (Mo.1957); *Adams v. Atchison, T. & S. F. Ry.*, 280 S.W.2d 84 (Mo.1955).

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE
CIRCUIT COURT OF THE CITY OF ST. LOUIS
(STATE OF MISSOURI)

Monday, October 17th, 1983

Cause No. 782-6694
Division No. 5

Harold E. Anderson,
Plaintiff,

-vs-

Burlington Northern
Railroad Company,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, the parties appearing by their respective attorneys, and the issues having been duly tried and the jury having duly rendered its verdict.

Wherefore, it is considered and adjudged by the Court that the plaintiff, Harold E. Anderson have and recover of the defendant, Burlington Northern Railroad Company the sum of EIGHT HUNDRED THOUSAND AND NO/100 ($800,000.00) DOLLARS, with interest thereon as provided by law, together with the costs of this proceeding and that execution issue therefor.

/s/ Daniel T. Tillman
Judge
Oct 26 1983
Date approved

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

(Filed July 1, 1983)

IN THE
CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 782-6694
Division No. 5

HAROLD E. ANDERSON,
Plaintiff,

v.

BURLINGTON NORTHERN
RAILROAD COMPANY,
Defendant.

DEFENDANT'S ALTERNATIVE MOTIONS FOR JUDGMENT NOTWITHSTANDING VERDICT AND FOR NEW TRIAL

* * *

DEFENDANT'S ALTERNATIVE MOTION FOR NEW TRIAL, OR FOR REMITTITUR

Comes now defendant and moves the Court to set aside the verdict of the jury heretofore rendered and the judgment entered thereon and, in the alternative to defendant's Motion for Judgment Notwithstanding the Verdict, prays the Court to grant defendant a new trial of all the issues in this case, or alternatively to order a re-

mittitur of at least one-half the amount of said judgment, upon the following grounds:

1. Because the verdict of the jury and the judgment entered thereon were and are against the greater weight of the credible evidence in the case.

2. Because the verdict and judgment were and are excessive in amount and therefore against the greater weight of the credible evidence in the case, and the amount of the verdict was not and is not supported by the evidence in the case.

* * *

7. Because the Court erred in giving, at the request of plaintiff and over the objections of defendant, Instruction No. 6 in the form of M.A.I. 24.01 for the following reasons:

(a) Because Instruction No. 6 fails to submit to the jury any act or omission of defendant constituting specific negligence, and erroneously submits to the jury, and permits the return of a verdict in favor of plaintiff and against the defendant on a charge of general negligence and thus and thereby grants the jury a roving commission to find that defendant was negligent on unspecified grounds and to return a verdict against defendant based upon such unspecified negligence.

(b) Because Instruction No. 6 fails to specify or limit the jury's consideration to any particular time or place or date as the cause of plaintiff's injury and permits the jury to return a verdict against defendant if defendant "failed to provide reasonably safe conditions for work, or reasonably safe appliances" to plaintiff at any time, whether or not such conditions prevailed on the date plaintiff claims he was injured.

(c) Because Instruction No. 6 gives the jury a roving commission and permits the jury to return a verdict against defendant regardless of how or when the jury might have believed plaintiff's eye was injured.

(d) Because Instruction No. 6 constitutes a submission of general negligence and gives the jury a roving commission to find against defendant on unspecified grounds of negligence in a personal injury case against defendant, an interstate common carrier by railroad, when under the law of Missouri such a submission would be improper as to any other type or class of defendant in the context of a personal injury suit. Thus Instruction No. 6 and M.A.I. 24.01 as adopted by the Supreme Court of Missouri discriminate against railroad companies operating in interstate commerce or whose activities substantially affect interstate commerce, and are thus subject to the Federal Employers Liability Act, and such instruction therefore imposes an improper and unlawful burden on interstate commerce in violation of the commerce clause of the United States Constitution, Article I, §8, and fails to give to such defendants equal protection with other personal injury defendants or other employers in singling out such defendants for disparate and unequal treatment in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, since in no other situation is the giving of a "general negligence" instruction permitted by the Missouri Approved Instructions in any similar context.

(e) Because said Instruction No. 6, when read in conjunction with Instruction No. 9 submitted by plaintiff, was indefinite, vague, ambiguous and gave the jury a roving commission to award plaintiff damages for such injury as they believed he might have sus-

tained ". . . as a result of the occurrence of May 6, 1977 . . ." although the evidence showed several "occurrences" of May 6, 1977, i.e., that plaintiff was using an air powered reamer at various times, that at different times plaintiff was underneath the center sills of hopper cars being constructed, that plaintiff may have removed his glasses or goggles and rubbed his eyes, or wiped his forehead and let a steel particle fall into his eye; that there was no evidence whatever to support any finding or conclusion as to when the steel particle got into plaintiff's eye, or how it got into plaintiff's eye, or whether he was actually engaged in his work at the time or had removed his eye protective equipment and simply let the metal particle fall into his eye from his hand, glove, sleeve, eyebrow or forehead, or that his getting of the metal particle into his eye was a result of any negligence of defendant whatever or was contributed to in whole or in part by any negligence of defendant.

* * *

WHEREFORE, in the alternative to Defendant's Motion for Judgment Notwithstanding Verdict, defendant prays the Court to set aside the verdict of the jury heretofore rendered and judgment entered thereon, and to grant defendant a new trial of all issues in this case, or in the alternative, to require plaintiff to remit at least one-half the amount of the verdict and to grant defendant a new trial on all the issues should plaintiff refuse to do so.

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CERTIFICATE OF SERVICE

Copy of the foregoing was served by delivering same this 1st day of November, 1983 to:

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/s/ Edwards W. Mullen

(Filed January 27, 1984)

MISSOURI CIRCUIT COURT TWENTY-SECOND
JUDICIAL CIRCUIT
(St. Louis City)

HAROLD E. ANDERSON

VS.

BURLINGTON NORTHERN RAILROAD COMPANY

No. 782-6694 Room 17 January 27, 1984

MEMORANDUM FOR CLERK

Defendant's Motion for Judgment Notwithstanding Verdict or for New Trial taken under advisement January 20, 1984, is herein denied.

SO ORDERED:

/s/ Daniel T. Tillman
Daniel T. Tillman
Judge

cc: Edward W. Mullen
1000 Bryant Building
1102 Grand Ave. Kansas City, Mo. 64106

C. Marshall Friedman,
The Advocate Building, 1133 Pine St.
St. Louis, Mo. 63101

POINT RELIED ON SET FORTH IN PETITIONER'S BRIEF ON APPEAL

* * *

VIII. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 6 IN THE FORM OF M.A.I. 24.01 BECAUSE SAID INSTRUCTION FAILED TO SUBMIT SPECIFIC NEGLIGENCE BUT DIRECTED A VERDICT ON GENERAL NEGLIGENCE, GAVE THE JURY A ROVING COMMISSION AND BECAUSE INSTRUCTION NO. 6 AND M.A.I. 24.01 DISCRIMINATE AGAINST RAILROAD COMPANIES OPERATING IN INTERSTATE COMMERCE AND SUBJECT TO THE FEDERAL EMPLOYERS' LIABILITY ACT THUS IMPOSING AN IMPROPER AND UNLAWFUL BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, AND SAID INSTRUCTION FAILS TO GIVE TO SUCH DEFENDANTS EQUAL PROTECTION WITH OTHER PERSONAL INJURY DEFENDANTS AND EMPLOYERS AND SINGLES THEM OUT FOR DISPARATE, UNEQUAL TREATMENT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

MISSOURI SUPREME COURT RULES

RULE 70. INSTRUCTIONS

Rule 70.01. Approval of Instructions—Effective Date —Publication Procedure

Approval of instructions in civil actions will be made by order of this Court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

Rule 70.02. Instructions to Juries

(a) Written Instructions—Giving or Refusing. After a jury has been sworn to try a case but before opening statements the court must read to the jury Missouri Approved Instruction No. 2.01 which will be marked and given to the jury along with the other instructions at the close of the case but will not be reread by the court. Before the case is submitted the court shall call a conference of counsel to consider instructions. Any party may, before the case is submitted, request the court to instruct the jury in writing on the law applicable to the issues. The court may give instructions on its own motion. All instructions shall be submitted in writing and shall be given or refused by the court according to the law and the evidence in the case. All instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts. All instructions shall be read by the court.

(b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions

contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

(c) Violation of Rule—Effect. The giving of an instruction in violation of the provisions of this Rule shall constitute error, its prejudicial effect to be judicially determined. However, the use of an approved instruction or following notes on use before the effective date shall not be presumed to be error.

* * *

Rule 70.03. Objections to Instructions

Counsel need not object to any instructions to be given at the request of any other party or by the court on its own motion or to the refusal of any instructions requested by such party. Specific objections to instructions shall be required in motions for new trial unless made at trial. The making of objections during trial shall not preclude making additional objections to the same or other instructions in the motion for new trial. No general objection to instructions is required.

* * *

MISSOURI SUPREME COURT RULES

RULE 83. TRANSFERS FROM DISTRICT OF COURT OF APPEALS TO THIS COURT AND RELATED MATTERS—PROCEDURE IN THE SUPREME COURT

* * *

Rule 83.03. Transfer by Supreme Court After Opinion by Court of Appeals

In any case in which a motion for rehearing has been overruled and an application for transfer under rule 83.02 has been denied, the case may be transferred by order of this court on application of a party for any of the reasons specified in rule 83.02, or for the reason that the opinion filed is contrary to a previous decision of an appellate court of this state. Application for such transfer shall be filed in this court within 15 days of the date on which transfer was denied by the court of appeals. Motions for reconsideration of the court's action in refusing an application for transfer shall not be accepted or filed.

Supreme Court, U.S.
FILED
APR 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

HAROLD E. ANDERSON,
Respondent.

On Petition for Writ of Certiorari
To The Missouri Court of Appeals
Eastern District

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Missouri State Court, in complete conformity with the decisions of this Court authorizing submission of general negligence issues to juries in FELA actions, properly submitted general negligence issues to the jury in this FELA action, as is also done in other state court negligence actions in which the substantive law and evidence provide for recovery based upon a finding of general negligence.

II. Whether any state regulation of or undue burden is imposed upon interstate commerce when a Missouri State Court permits an FELA plaintiff to bring an action in state court pursuant to the FELA to vindicate his federal rights pursuant to federal law and the jury is properly instructed in accordance with the federal substantive law.

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No. 85-1574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

HAROLD E. ANDERSON,
Respondent.

On Petition for Writ of Certiorari
To The Missouri Court of Appeals
Eastern District

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTIONAL STATEMENT

Respondent (hereinafter, "plaintiff") accepts petitioner's (hereinafter "defendant") Jurisdictional Statement with the following exceptions: Plaintiff specifically denies that the pattern jury instructions defendant challenges are in any manner unconstitutional or that the judgment of the Missouri Court of Appeals is contrary to any applicable decision of this Court or the highest courts of the several other states.

STATEMENT OF THE CASE

Defendant's Statement Of The Case does not constitute a full and fair statement of facts relevant to the issues herein. In order to avoid repetition additional relevant facts will be set forth in the argument.

ARGUMENT

I.

Absolutely No Equal Protection Violation Occurred As A Result Of Submitting The Instant Case On Plaintiff's Verdict Directing Instruction Patterned After MAI 24.01. MAI 24.01 Is Consistent With The Substantive Law Of The FELA And, Accordingly, The Form Of The Instruction Is A Question To Be Determined By State Law.

Defendant's contentions concerning MAI 24.01 have previously been raised and consistently rejected in *Bair v. St. Louis-San Francisco Railway Co.*, 647 S.W.2d 507, 510 (Mo. banc, 1983) *cert. denied sub. nom. Burlington Northern, Inc. v. Bair*, ____ U.S. ____, 104 S.Ct. 107, (1983), *Dunn v. St. Louis-San Francisco Railway Co.*, 621 S.W.2d 245, 254-255 (Mo. banc 1981), *cert. denied sub. nom., Burlington Northern Railroad Co. v. Dunn*, 454 U.S. 1145, 102 S.Ct. 1007 (1982); *Griffith v. St. Louis-San Francisco Railway Co.*, 559 S.W.2d 278, 280 (Mo.App. 1977), *cert. denied*, 436 U.S. 926, 98 S.Ct. 2821 (1978); *White v. St. Louis-San Francisco Railway Co.*, 602 S.W.2d 748, 754 (Mo.App. 1980); *Marshell v. Burlington Northern, Inc.*, 637 S.W.2d 168, 169 (Mo.App. 1982).

Plaintiff's verdict directing instruction and MAI 24.01 completely comply with the substantive law of the FELA, and defendant has not contended otherwise. Almost 70 years ago, this Court authorized the submission of a railroad defendant's negligence under general negligence instructions. In *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 38 S.Ct. 318 (1918), this Court rejected the defendant railroad's challenge to a submission of general negligence to the jury in emphatic terms, speaking through Justice Holmes:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as

> to each. *But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question.* We are not left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snow storm raging which the jury might have found to have been of unprecedented violence, and it was open to them to find in view of circumstances unnecessary to detail that the dispatcher ought not to have sent out Extra 510 West as he did and that he was grossly wrong in not allowing 504 to come in and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor of 501 at Potter. It is superfluous to say more upon this point."

246 U.S. at 332-333, 38 S.Ct. at 319 (emphasis supplied). Consequently, *Hadley* expressly authorizes submission of general negligence issues to the jury under the FELA.

The principle that a finding of general negligence is appropriate and sufficient under the FELA has, since *Hadley,* been reaffirmed by this Court. The holding in *Hadley* was reiterated by this Court in *Blair v. Baltimore & O.R. Co.,* 323 U.S. 600, 604, 65 S.Ct. 545, 547 (1945), as follows:

> "The negligence of the employer may be determined by viewing its conduct as a whole. Union Pacific Railroad Co. v. Hadley, 246 U.S. 330, 332, 333, 38 S.Ct. 318, 319, 62 L.Ed. 751. And especially is this true in a case such as this, where the several elements from which negligence might be

> inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

This Court's decisions in *Hadley* and *Blair,* therefore, expressly authorize submission of and a finding in favor of a plaintiff and against a defendant railroad, under the FELA, based upon said defendant's general negligence.

The FELA is an avowed departure from common law negligence rules of liability, and said common law rules are not to be followed or depended upon in interpretting the FELA. *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326, 329, 78 S.Ct. 758, 762 (1958). The differences between the substantive law of the FELA and Missouri common law negligence actions justify submission of general negligence issues in the former, while authorizing submission of specific negligence issues in the latter. This was recognized and explained by the Missouri Supreme Court in *Ricketts v. Kansas City Stock Yards Co.,* 484 S.W.2d 216, 221-222 (Mo. banc 1972). The Missouri Supreme Court explained the general submission of negligence in MAI 24.01 as follows:

> "The Act [F.E.L.A.] provides an employer under it shall be liable "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees." 45 U.S.C. §51. As recently said in Boeing Co. v. Shipman, 5th Cir., 411 F.2d 365, 371: "Slight negligence, necessary to support an F.E.L.A. action, is defined as 'a failure to exercise great care,' and that burden of proof, obviously, is much less than the burden required to sustain recovery in ordinary negligence actions. Prosser, Law of Torts, §34, p. 186 (3d ed. 1964)"; see also Prosser, Law of Torts, §82, p. 560, noting as to the F.E.L.A. negligence; "This has been said to reduce the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the 'vanishing point.' " *This would seem to be a reason for MAI to allow a general submission of negligence in F.E.L.A. cases."*

484 S.W.2d at 221 (emphasis supplied). The substantive differences, therefore, between the ordinary Missouri common law negligence action and an action premised upon the FELA completely justify the differences in the verdict directing instructions utilized.

Furthermore, defendants contention that general negligence submissions are prohibited under Missouri law, and that railroad defendants are treated like no other defendants against whom negligence actions are brought, is simply incorrect. In a recent decision in an action brought to recover damages pursuant to §400.7-204 RSMo (1981) which requires a defendant to exercise such care "as a reasonably careful man would exercise under like circumstances", the Missouri Court of Appeals ruled not only that a *general negligence* submission was appropriate, but also recommended that the submission of defendant's negligence be based upon pattern instruction MAI 31.02(3), Verdict Directing—Res Ipsa Loquitur—General, stating:

> "[6, 7] Pittman's [Defendant] second point suggests instructional error. Instruction No. 7, the verdict director, was based on multiple acts of negligence and was a modification of MAI 17.02. Pittman says *this instruction failed to instruct* on the warehouseman's duty and *failed to set out the specific acts or omissions of Pittman which constituted a breach of the duty of negligence.*
>
> [8] For the submission of an action for *general negligence* against a warehouseman bailee, MAI 31.02(3), based upon the *res ipsa loquitor* doctrine, would have been appropriate in this case."

Royster v. Pittman, 691 S.W.2d 305, 308 (Mo.App. 1985) [Bracketed material and emphasis supplied]. Where the *substantive law and the evidence* support one, as in *Royster* and the instant case, *general negligence* and even *res ipsa loquitur* submissions are proper and provided for by Missouri law and MAI. Moreover, FELA defendants are not treated differently from all other defendants against whom negligence actions are brought in the Missouri state courts.

Here the substantive law, as declared by this Court in *Union Pacific R. Co. v. Hadley,* 246 U.S. 330, 38 S.Ct. 318 (1918) and *Blair v. Baltimore & O. R. Co.,* 323 U.S. 600, 65 S.Ct. 545 (1945), expressly authorize a general negligence submission. Moreover, as discussed below, the evidence unquestionably makes this an appropriate case for such a submission.

Plaintiff's verdict director submitted alternative findings of negligence to the jury: "First, defendant either failed to provide: reasonably safe conditions for work, or reasonably safe appliances,...". Plaintiff presented evidence that overwhelmingly established defendant failed to provide reasonably safe working conditions due to the fact that the metal shavings, dust, dirt and debris that were created and allowed to accumulate and defendant failed to provide reasonably safe appliances due to the total inadequacy of the eye protective equipment defendant issued which allowed metal shavings, and other debris to get on the face, in the vicinity of the eyes and the eyes of plaintiff and other workers. As more fully set forth below the evidence presented at trial fully justified the submission of the case to the jury on the alternative findings set forth in plaintiff's verdict directing instruction. Indeed, there was more than sufficient evidence for the jury to find negligence in both defendant's failure to provide reasonably safe conditions for work or reasonably safe appliances.

Plaintiff began working for defendant on August 9, 1976, washing and cleaning cabooses and business cars. (T. 487) Plaintiff received no instructions or training of any type pertaining to eye protection. (T. 488, 489) Plaintiff ws assigned to work on the hopper car assembly line at position number 4 about two months before his injury on May 6, 1977. (T. 490) No foreman showed plaintiff how to do the job; he was merely told to "get with Emmitt [Davenport, a co-worker], and do the job". (T. 491) Davenport had been put on the hopper car assembly program with no training or prior experience and had been working at position 4 for eight or nine months before plaintiff was injured. (T. 272, 274)

At defendant's Consolidated Freight Car Shop, defendant manufactured hopper cars on an assembly line basis. The cars were assembled at different positions on the line and the end result was a completed hopper car. A steel beam called a center sill ran the length of the hopper car and formed the main support. (T. 83) The center sill was hollow with a partial opening along the bottom with a lip on either side running its entire length. (T. 83) At position number 3, six hopper chutes were attached to the center sill in 3 pairs, with a chute on each side of the center sill. (T. 121, 255) Plaintiff worked at position number 4. At position 4, a pre-formed piece of metal called a hog trough was put over the hopper chutes and the center sill. (T. 83, 121, 122) There were pre-drilled holes in each of these pieces which did not align properly and an air-powered reamer was regularly used to ream out the holes. (T. 122, 241, 242) Twelve holes in each chute were reamed at position 4. All but two holes involved all three thicknesses of metal. (T. 90, 241) Employees stuck special bolts called huck-bolts in each reamed hole by reaching up inside the center sill from beneath the hopper car. (T. 126, 127, 167, 168, 283, 284, 501, 505) Employees were required to look up at the hole while sticking the bolts. A huck-gun was used to tighten and fasten the bolts in place and snapped off the end of the bolt. (T. 96) In addition, the workers at position 4 would hammer clamps in place to hold the air lines for the brake system. (T. 296) Once this work at position four was completed the car was moved to position five where the sides were hung and other work was done on the car. (T. 529).

Plaintiff and several witnesses, all familiar with position 4, testified as to the type of work done there, the tools and equipment used, and the unsafe conditions that existed at position 4. At trial, a full scale model of a partially constructed hopper car was offered and received into evidence as Plaintiff's Exhibit No. 3. (T. 182, 183) This model consisted of a portion of the center sill with a portion of the hopper chute and hog trough attached and was used in demonstrating the work performed at position

number four. (T. 87, 89, 90, 189, 190, 239, 279, 280) An air-powered reamer with a reaming bit was offered and received into evidence as Plaintiff's Exhibit No. 4. (T. 182, 183) A huck-bolt of the same variety as used at position four was in evidence as Plaintiff's Exhibit No. 4A. (T. 182, 183) By use of the model, reamer and huck-bolt, witnesses demonstrated to the jury the manner in which the work was performed.

Defendant issued plaintiff "safety" glasses marked as Plaintiff's Exhibit No. 16. Plaintiff was assigned to work with Emmitt Davenport who knew nothing about eye protection and wore the same type of safety glasses as plaintiff. (T. 275, 276, 278, 491) No one took exception to plaintiff wearing these safety glasses or told him he should be wearing anything different. (T. 493, 494, 514) These safety glasses issued to plaintiff and worn by him at the time of his injury were nothing more than spectacles, horned rimmed glasses with perforated plastic side shields. (T. 366, 491) These glasses were inadequate and afforded plaintiff no more protection than regular eye glasses. (T. 365-366) Metal shavings from the work at position 4 got in behind the glasses, in the vicinity of the eyes and also into the eyes themselves through the gaps at the top and bottom of the frame, at the brow, around the cheeks and adjacent to the nose. (T. 501, 502) These glasses, Plaintiff's Exhibit 16, simply did not prevent metal shavings, created by the work at position 4, from getting into the eyes and area of the eyes of employees, including plaintiff. As set forth in more detail below, employees repeatedly complained about these glasses and requested better eye protection prior to plaintiff's injury.

Apart from the fact that the glasses provided to plaintiff were totally inadequate, there was overwhelming evidence that the working conditions at position number 4 where plaintiff worked were *not* reasonably safe and in fact created hazards for the workers. The jury heard the detailed and substantial testimony of plaintiff and several witnesses, all of whom had personally worked at position number 4 and experienced the same hazardous working conditions at position number 4.

As set forth above, an air-powered reamer was used at position number 4 to ream out pre-drilled holes in the hog troughs, hopper chutes and center sills to allow huck-bolts to fit through. (T. 122, 242) The reamer used at position number 4 was powered by compressed air and had an exhaust vent which pointed forward toward the front where the reamer bit came into contact with the metal to be reamed. (T. 93, 281) The exhaust from the reamer caused metal shavings lying on and about the center sill and slope sheets to be blown about striking the employees in the face, vicinity of the eyes and in the eyes. (T. 93-94, 192, 242, 281, 501) In total there were six hopper chutes in three pairs attached to each side of the center sill. (T. 282) Of the twelve holes at each chute all but two involved reaming all three thicknesses of metal. (T. 90, 241) Reaming the holes would generate a lot of metal shavings, which would collect on the slope chutes and center sill of the hopper car. (T. 93, 94. 241, 242, 258, 507, 508) Some of the metal shavings would fall through to the other side where they would collect on the lips of the center sill of the car or fall to the floor while the rest of the shavings would stay on the same side as the reamer. (T. 95, 105, 109, 110, 153, 205, 500, 508)

In reaming the holes the workers were required to crawl into the center of the hopper chute from underneath, stand on the floor, and lean along the length of the hopper chute supporting themselves with their legs, elbow, and shoulder while holding the reamer to get up to the holes. They could not do the job any differently, nor were they ever instructed to do the job any differently. (T. 90, 91, 148, 149, 190, 239, 240, 322, 323, 501) The metal shavings would be blown by the exhaust from the reamer, and would bounce off of the hopper chute (also called the slope sheet), the hog trough, and the center sill and would get in the clothes, hair, face, eyebrows, in the vicinity of the eyes, and in the eyes of the workers on numerous occasions. (T. 93, 94, 192, 193, 265, 282, 501) Hot reamer shavings would come out, stick, and burn through the employees clothes. (T. 241) Dirt, dust,

metal shavings and rust that would collect on the hopper chute would be blown about by the exhaust. (T. 242)

Employees were also required to stick huck-bolts at the number 4 position. The only way to stick the huck-bolts into the holes was to crawl beneath the center sill, squeeze in between the hopper chutes and look up toward and reach in from directly beneath the holes with one hand while using the other hand or elbow for support. (T. 126, 127, 167, 168, 283, 284, 501, 505) Shavings which had collected on the lips on the inside of the center sill would fall down when employees stuck the bolts in the holes and would get into the clothes, hair, face, the vicinity of the eyes, and in the eyes. (T. 285, 501, 502, 504) The gloves which the workers wore to protect their hands from the shavings and sharp surfaces had stiff sides which extended over the wrist and brushed down metal shavings into the employees' faces while they were sticking the huck-bolts. (T. 166, 167, 176, 177, 178, 284, 285, 506) The hazards from the metal shavings falling into employees' faces and eyes was increased when the defendant required one worker to stick bolts at the same time another reamed or used the huck gun to speed production. (T. 159, 160, 163, 164, 180, 181, 248, 294, 503) The reaming would generate even more shavings which would collect on the center sill and fall through the opening while the impact of the huck gun snapping off the bolts would shake additional shavings loose from the impact which in turn would fall onto the face of the worker inserting the huck-bolts. (T. 97, 154, 294, 295, 504) Additional shavings would fall into the employees' faces while hammering clamps in place to hold the air lines for the brake system. (T. 168, 169, 295, 296, 504, 505) Further, the shavings would collect on the floor along the length of the car where they would be allowed to accumulate because there were no laborers provided to clean up along the line. (T. 110, 242, 243, 292, 293) When wind would blow through the open doors of the freight car shop, the metal shavings, particles, dust and other debris which had accumulated would blow around. (T. 197)

The jury heard substantial testimony from plaintiff and several witnesses that they had repeatedly complained about the hazardous conditions they personally experienced while working at position number four. Complaints had been made personally to the foremen and the problems and hazards were brought up numerous times at safety meetings. (T. 113, 192, 195, 244, 246, 228, 499, 500, 502, 503) Complaints were made that the shavings were being blown around by the exhaust and back into the clothes, hair, face, vicinity of the eyes and the eyes of the workers while they were reaming. (T. 111, 245, 501, 502) Similarly, complaints were also made about the shavings falling down on the workers while they were sticking the huck-bolts underneath the center sills and getting in the clothes, hair, face, vicinity of the eyes, and the eyes of the workers. (T. 501) Plaintiff and the witnesses all complained about the accumulation of the shavings, dirt, dust and debris and requested laborers be provided to clean up at position number four. (T. 193, 287, 288, 500, 508) There was also testimony that the workers were not allowed enough time to clean up the shavings themselves and were discouraged in their attempts to do so. (T. 178, 316, 317) Despite numerous complaints nothing was ever done before plaintiff was injured. (T. 112, 132, 288, 289) There was also the overwhelming evidence of numerous complaints about particles, dust, and metal shavings getting behind the safety glasses marked Plaintiff's Exhibit No. 16, into the vicinity of the eyes and in the eyes themselves.

The personal experience these witnesses had with the inadequate eye protection afforded by the safety glasses (Pl. Ex. 16), was further supported by the expert testimony of Mr. James O'Neal. Taking into account the conditions at position number four, Mr. O'Neal testified unequivocally that the safety glasses marked Plaintiff's Exhibit No. 16 were totally inadequate for the eye safety hazards encountered at position number 4 because of the gaps above the eyebrow and at the side. (T. 362-366) Mr. O'Neal was Director of Industrial Services for the National Society to Prevent Blindness, working at their offices

in New York for almost 28 years. (T. 342) As the representative from the National Society to Prevent Blindness, Mr. O'Neal was intimately involved with the American National Standards Institute (ANSI) which promulgated eyewear safety standards. (T. 344-349) Prior to this employment Mr. O'Neal had worked as a machinist and was familiar with air-powered reamers, having used them to ream metal. (T. 356) Mr. O'Neal was familiar with hopper cars and with a hopper car assembly program. (T. 362)

The evidence overwhelmingly showed that the safety glasses (Plaintiff's Exhibit 16) were totally inadequate. The jury heard testimony that other eye protective equipment was readily available on the market that would have afforded plaintiff the necessary protection in light of the eye safety hazards encountered at position number 4. Mr. O'Neal gave his opinion as an expert, which was further supported by the witnesses at trial, that the black rubber frame goggle (also called the black Bouton goggle) marked Plaintiff's Exhibit 12 and admitted into evidence, when worn in combination with a face shield attaced to the hard hats which the workers wore, Plaintiff's Exhibit No. 11, would provide adequate protection, preventing metal shavings from getting in the face, in the vicinity of the eyes and most importantly in the eyes themselves. (T. 116-118, 195, 222, 286, 364-369, 586) Unlike the "safety" glasses (Pl. Ex. 16) issued to plaintiff which had numerous gaps permitting the entry of metal shavings into the area of the eye, the black rubber goggles (Pl. Ex. 12) recommended by O'Neal were form fitting, were contoured, and had a wide rubber lip. (T. 369) Unlike the "safety" glasses (Pl. Ex. 16), the black rubber goggles always provided a terrific fit. (T. 369) Of course, plaintiff was never provided these black rubber frame goggles or face shield prior to his injury. Additionally, the jury heard testimony from Mr. O'Neal that a proper eye safety program would tailor the eye protection to the particular conditions and hazards encountered at each job. (T. 359-361) Defendant had no eye protection program

during the time of the hopper assembly program. The employees received no instructions, training or classes as to the eye hazards they would encounter, nor were there any instructions or supervision in the proper selection and use of eye protective equipment. (T. 84, 85, 100, 187, 237-239, 273, 275, 488, 492-494)

At the time of the occurrence on May 6, 1977 plaintiff was working at position number four. (T. 503) He first felt something unusual at about 2:00 or 2:30 that Friday afternoon. (T. 506) He was reaming the last three holes on the end of the chute when he first felt something unusual. (T. 507) These holes were adjacent to the slope sheet. (T. 507) He had previously been sticking huck-bolts under the sill. (T. 507) The working conditions were as previously described. (T. 507) Plaintiff reamed the last three holes and felt his eye burning. (T. 508) It reamed the last three holes and felt his eye burning. (T. 508) It was an irritated feeling, like a flashburn, a burn to the eye caused by arcing a weld too close to a worker. (T. 508) Flashburns were frequent occurrences and would last about two or three days. (T. 509) Plaintiff went to his foreman's office and got some eye wash to wash his eye and returned to work. (T. 509) Plaintiff was off work on Saturday and Sunday. (T. 510) He stayed at home with the lights off because he could not stand the light. (T. 510) When plaintiff returned to work on Monday his eye still burned. (T. 510) Plaintiff continued to complain to his foremen about the injury to his eye and received only minor first-aid treatment up until the time that he was sent to see the Frisco doctor, Dr. Stewart, who drilled in plaintiff's eye and removed a piece of steel. (T. 510, 512). Ultimately his eye was enucleated (surgically removed) and a prosthetic conformer implanted.

From the foregoing it is clear that the evidence overwhelmingly established that the injury to plaintiff rsulted from the total inadequacy of the safety glasses that plaintiff was issued and was wearing at the time of his injury. The evidence clearly demonstrates that the safety glasses completely failed to protect

plaintiff from the hazardous conditions he encountered while working at position number 4. Had plaintiff been provided the rubber goggles (Pl. Ex. 12) and face shield (Pl. Ex. 11) described by expert witness O'Neal his injury could have been avoided.

The applicable substantive law and the evidence in the instant case completely justifies plaintiff's submission under MAI 24.01, even though specific negligence submissions are customarily utilized in ordinary Missouri common law negligence actions. Here, several aspects of the working conditions (i.e. accumulation of shavings, blowing of shavings by the wind, shavings being propelled by the reamer bit and exhaust, accumulated shavings dropping on employees while sticking bolts) were all closely interwoven in a single pattern comprising the unsafe working conditions to which plaintiff was exposed. Rather than being separate assignments or grounds of negligence, as contended by defendant, they are merely different aspects of the overall working conditions to which plaintiff was exposed and which were found by the jury to be unsafe. The instant case—more than either *Hadley* or *Blair*—was unquestionably a proper one for a general negligence submission.

Under the provisions of the Federal Employer's Liability Act, defendant was obligated to fulfill its nondelegable duty to provide plaintiff with reasonably safe conditions and reasonably safe appliances for work, stripped of its common law defenses and liable if its negligence played any part, however slight, in producing plaintiff's injuries. This is a statutory negligence action that makes it substantively different from the ordinary common law negligence action. 45 U.S.C. Section 51, *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507-509, 77 S.Ct. 443, 448-450 (1957); *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7, 83 S.Ct. 1667, 1671-1672 (1963). Under the FELA, juries are not limited in their consideration of the evidence, as they are under common law actions. *Chicago, Rock Island & Pacific R.R. v. Melcher,* 333 F.2d 996, 999-1000 (8th Cir. 1964). They are permitted to draw inferrences based

upon circumstantial evidence even though such inferrences might involve some speculation and conjecture. *Webb v. Illinois Central Railroad Co.,* 352 U.S. 512, 77 S.Ct. 451 (1957); *Lavender v. Kurn,* 327 U.S. 645, 653, 66 S.Ct. 740, 744 (1946). Plaintiff's verdict directing instruction properly submitted the ultimate issue of liability under the applicable substantive law.

Missouri rules concerning the form of approved instructions are procedural in nature. *Meredith v. Missouri Pacific Railroad Co.,* 467 S.W.2d 79, 82 (Mo. 1971). When, as here, an instruction in an F.E.L.A. case correctly states the substantive law and is clearly supported by the evidence, the form of the instruction is a matter left to state procedural law. *Union Pacific Railroad Co. v. Hadley,* 246 U.S. 330, 38 S.Ct. 318 (1918); *Minneapolis & St. Louis Railroad Co. v. Bombolis,* 241 U.S. 211, 36 S.Ct. 595 (1916); *C.f., Lyons v. State of Oklahoma,* 322 U.S. 596, 601, 64 S.Ct. 1208, 1212 (1944); *Brown v. Gerdes,* 321 U.S. 178, 189-190, 64 S.Ct. 487, 492-493 (1944) (concurring opinion).

The applicable substantive law and the evidence completely justified submission under MAI 24.01 in the instant case under the controlling decisions of this Court. Consequently, it is of no import that in many ordinary Missouri common law actions, submissions of specific negligence may be required. The difference in the substantive law and the evidence in the instant case provides a rational basis for submitting general negligence issues to the jury. Since there was a rational basis for treating the instant case differently from ordinary common law negligence actions, defendant's right to equal protection is not implicated. *G. D. Searle & Co. v. Cohn,* 455 U.S. 404, 408, 102 S.Ct. 1137, 1141 (1982).

II.

No Violation Of The Interstate Commerce Clause, Article One, Section Eight Of The United States Constitution, Has Or Can Be Demonstrated. In The Instant Case, Plaintiff Was Vindicating Federal Rights Granted To Him By The Congress Of The United States Under 45 U.S.C. §51 Et. Seq. The FELA Specifically Provides That Actions For The Recovery Of Damages Based Upon An Employer-Railroad's Negligence May Be Brought In State Court. Consequently, Plaintiff Was Vindicating His Federal Rights Pursuant To Federal Law And No State Regulation Of Interstate Commerce Occurred. Nor Has Any Undue Burden On Interstate Commerce Resulting From Any State Regulation Been Implicated.

In the instant case, defendant has totally failed to demonstrate that any state regulation of interstate commerce inconsistent with the federal law applicable to said interstate commerce has occurred. Quite to the contrary, plaintiff brought suit in the state court to vindicate federal rights granted under the FELA, 45 U.S.C. §51 et. seq. As set forth more fully above, the law applied by the Missouri state courts in the instant case was in complete harmony with the federal decisions under the FELA. Defendant's contention, therefore, that Missouri imposes an undue burden on interstate commerce must be flatly rejected. This Court in *Mondou v. New York, New Haven & Hartford Railroad Company,* 223 U.S. 1, 32 S.Ct. 169 expressly held that Congress's enactment of the FELA was properly based upon its authority to regulate interstate commerce, did not violate equal protection and that state courts had the duty to entertain suits brought by railroad employees injured in a furtherance of interstate commerce. An FELA plaintiff bringing suit in state court pursuant to 45 U.S.C. §56 is vindicating federal rights pursuant to specific congressional authorization, and not any rights created by the state. *Baltimore & O.R. Co. v. Kepner,* 314 U.S. 44, 52, 62 S.Ct. 6, 9-10 (1941). As a result, no *state* regulation of interstate commerce is in any manner implicated.

Secondly, defendant has completely failed to demonstrate any undue burden on interstate commerce. As noted in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Company,* 393 U.S. 130, 144, 89 S.Ct. 323, 331 where this Court rejected a defendant's contention that the Arkansas full crew laws violated the equal protection clause, or imposed an undue burden on interstate commerce, stating:

> "As we have said many times, Congress unquestionably has the power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of Congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry."

Moreover, as this Court has recognized a state does in fact have a legitimate interest in providing a proper remedy for its injured workers which outweighs the incidental burdens, if any, on interstate commerce. *Collins v. American Buslines, Inc.,* 350 U.S. 528, 531, 76 S.Ct. 582, 584 (1956). Consequently, even assuming *arguendo* that state regulation occurred, no undue burden on interstate commerce has been demonstrated.

In the instant case Congress has exercised its power under the Commerce Clause by enacting the FELA and authorizing employees to bring actions for damages in state court. The conduct of the instant trial was in complete conformity with the FELA. Consequently, the state imposed no burden of any type (and certainly no undue burden) on interstate commerce.

CONCLUSION

For all of the foregoing reasons, plaintiff (respondent) respectfully submits that the judgment of the Missouri Court of Appeals, below, is entirely correct and that the same does not warrant review by the court. For that reason, it is further respectfully submitted and urged that the petition for writ of certiorari in the instant case should be denied.

Respectfully submitted,

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